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No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Petitioners,

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Indiana legislature adopted statutes in 1991 to forbid the hauling of consumer goods in vehicles that have hauled garbage, and to require that such vehicles be registered and labeled as garbage trucks. The question presented is whether the court of appeals erred in striking down those laws under the dormant Commerce Clause even though the laws (1) do not facially discriminate against interstate commerce, but apply the same rules to both local and interstate transactions; and (2) promote legitimate State objectives.

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OPINIONS BELOW

The opinions of the court of appeals (App. 1) and the district court (App. 35) are not yet reported.[1]

JURISDICTION

The court of appeals entered its judgment on September 17, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Indiana "backhauling" law is Ind. Code § 13-7-31-13.1. The municipal waste vehicle registration and labeling provisions are set forth in Ind. Code §§ 13-7-31-8 to -8.2. The fees for the registration program are in Ind. Code § 13-7-31-16.1. All those statutes are set forth in the Appendix beginning at page 71.

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[1]Materials in the Appendix bound with this Petition are cited "App. ___." Record documents are cited "R. ___ at ___" to indicate first a document's number on the docket sheet and then the page number. The trial transcript is cited "Tr. __ at __" indicating first the transcript volume (as numbered by the court of appeals) and then the page number. Deposition testimony admitted into evidence is cited "Dep. ___ at ___," indicating the deposition volume (as numbered by the court of appeals) and then the page number. Exhibits are cited by their designation in the district court, such as "Pl. Ex. 7 at __."

STATEMENT OF THE CASE

I. The Challenged Statutes

In 1991 the Indiana legislature enacted laws restricting the goods that can be hauled on vehicles that haul municipal waste, and requiring such vehicles to be registered and labeled.

The so-called "backhauling" law provides that a municipal waste vehicle may collect and transport in Indiana only municipal waste and eight other types of material: (1) special industrial waste, (2) hazardous waste, (3) coal combustion waste, (4) recyclables, (5) wood, concrete, brick, and other construction and demolition materials, (6) dirt, sand, gravel, asphalt, salt and other highway maintenance materials, (7) coal, gypsum, slag, scrap metal, and other bulk industrial commodities, and (8) infectious waste. Ind. Code § 13-7-31-13.1. The backhauling law applies to all vehicles that haul waste commercially for disposal in Indiana, regardless of the origin of the waste or the origin of the vehicle.

The Indiana legislature also required that all municipal waste vehicles in Indiana be registered and labeled with stickers. Ind. Code §§ 13-7-31-8 to -8.2. The legislature set a registration fee of $100 per company (for a two year period) plus $1.50 per vehicle for stickers. Ind. Code § 13-7-31-16.1. Like the backhauling law, the vehicle registration and labeling laws apply to all vehicles that haul waste commercially for disposal in Indiana, regardless of the origin of the waste or the origin of the vehicle.

II. The Lawsuit and the Evidence

The respondents are brokers who arrange for long-distance shipments of garbage from the East Coast to other States. They sued petitioners Bayh and Prosser in the district court alleging that the backhauling, vehicle registration and labeling, and other Indiana laws violated the Commerce Clause. The brokers brought the action under 42 U.S.C. § 1983, basing federal jurisdiction on 28 U.S.C. §§ 1331 & 1343, and seeking both declaratory and injunctive relief. The district court dismissed most of the challenges and then conducted a bench trial on the backhauling and vehicle registration and labeling laws.

A. Interstate Waste Shipments

The evidence at trial showed that because landfill disposal charges in the East can be relatively high, it can be cheaper to haul garbage as far as the Midwest for disposal in landfills. *See* App. 43. The respondent brokers act as middlemen among East Coast garbage transfer stations, truckers who transport the waste to the Midwest, and landfills. App. 42-43. The brokers make arrangements for each load of waste on an *ad hoc* basis, though some companies haul for the brokers regularly and others only occasionally. App. 43, 48.

Like traditional garbage trucks, some long-haul trucks are used exclusively for purposes of hauling waste. Dep. 6 at 10; Tr. 2 at 130-32 & 152-53. However, many trucks that haul municipal waste haul commodities to the East, then haul municipal waste back to the Midwest, then haul other commodities to the East, and so on. A typical scenario is that a trucker has hauled a product, which could be anything from manufactured goods to watermelons, from the Midwest to the East and must return to the Midwest for another load. A broker can arrange for the trucker to haul trash on the return trip. App. 43-44. The practice of hauling some goods in one direction, and then other goods on the return trip, is generally referred to as "backhauling."[2]

B. Indiana's Commercial Reputation Interest

The evidence showed that the backhauling law will help protect the commercial reputation of Indiana products from the serious taint of being hauled in trucks that haul garbage. App. 54. Specifically, the evidence showed (a) that the practice of "backhauling" received extensive national media coverage, much of it focused on Indiana; (b) that shippers of a host of types of products object to having their products hauled on trucks that have

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[2]Because of the sequential, round-trip nature of trucking, the term "backhauling" can be ambiguous as to which load constitutes the "front haul" and which the "back haul." Unless otherwise noted, petitioners use the term "backhauling" to refer to hauling goods in a vehicle that has already hauled trash.

hauled garbage; and (c) that truckers who haul garbage do not want to disclose that fact to their customers.

When the recent practice of hauling other goods in trash trucks was discovered by the media, the reaction was widespread and dramatic. An Indiana resident who lives near a landfill testified she had been on television or interviewed by the print media hundreds of times on the topic, including appearances on national shows such as ABC Nightly News, World Monitor, and the Donahue Show, as well as interviews with national publications such as the *Wall Street Journal* and the *Chicago Tribune*. Tr. 3 at 360-61. Indiana policymakers were well aware of the extensive media coverage. Tr. 5 at 748-49. The Governor's aide for environmental affairs described the coverage and said the national television coverage of the issue included "an awful lot of talk about products from Indiana traveling in garbage trucks," which "animated my views about the concerns about the commercial reputation of products in Indiana." Tr. 5 at 750.

Manufacturers of products such as compact discs and clothing testified they did not want the reputations of their products tainted even by mere association with garbage. Dep. 12 at 7-9; Dep. 8 at 5-8. Some trucking companies that had engaged in backhauling in the past had quit the practice because of demands by their other customers. Dep. 1 at 8, 21; Dep. 4 at 19-20; Dep. 13 at 7-11. The record does not reveal a single manufacturer that wants its goods shipped in garbage trucks (at any price); nor does it reveal a single trucking company that wants its other customers to know it hauls trash.[3]

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[3]Evidence on these preferences was uncontroverted, so much so that the district court excluded otherwise admissible evidence on the point as cumulative. App. 41. In fact, respondents even offered similar evidence. One respondent acts as a shipping agent for, among other things, stuffed toy animals. While that broker would have "no qualms" about shipping the toys in trash vehicles, he said he would not tell his customer (the shipper) his toys were being shipped in trash vehicles because "I don't like to start complications." Dep. 10 at 9-10.

C. Health Risks of Backhauling

The evidence also showed that backhauling poses potential health risks, but that the novelty of backhauling and the difficulty of tracing the causes of illnesses make it impossible to determine the extent of the risks. A 1990 report to Congress by the GAO, which the brokers introduced in evidence, concludes that federal health experts "know neither the extent nor nature of the potential health risks." Pl. Ex. 7 at 4. Two federal officials stated in the report they believed the risks to be small, but they did not rule out such risks. Also, the limited level of reporting of food borne illnesses would make doubtful any conclusion of no risk. Tr. 5 at 641-42; *see also* Pl. Ex. 7 at 4 ("the vast majority of food borne illnesses are not reported to CDC and few reported cases are traced to their sources"). The officials also stated that "using multipurpose trucks to carry garbage ... is a relatively new activity; and detectable adverse health effects may not have emerged." *Id.* at 6.

Another expert quoted in the report "testified that the loading of dangerous wastes onto food trucks has the potential to contaminate food," *id.* at 42, and that it would be "impossible -- or at least forbiddingly expensive -- to make a garbage container compatible with food," *id.* at 38. In addition, according to news reports considered by the State as part of the background for the law, the FDA has warned the food industry of "risks associated with backhauling of solid waste in conveyances used to transport food" and has sought to discourage the practice. Tr. 5 at 756-67.

An Indiana State Board of Health official experienced in food safety testified that "the potential exists for just about every pathogen in existence" to be in municipal waste, and that pathogenic bacteria would likely be present in trucks that had just hauled municipal waste. Tr. 5 at 615-16. He also described how these pathogens could remain in trucks (especially in dry vans built with porous wooden interiors), and could contaminate later cargoes through direct contract or airborne bacteria. Tr. 5 at 622-24.[4]

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[4]According to the GAO report: "Clearly, garbage contains many harmful components. Disease-producing organisms, known as pathogens, (continued...)

D. Benefits of Vehicle Registration and Labeling

The registration and labeling provisions in the law are designed to help Indiana enforce the backhauling law. App. 57. Shippers want to know if a truck has hauled waste, and truckers do not want to tell them. App. 57, 24. Indiana showed that the registration and labeling program will give shippers information they want about truckers with whom they do business. The law therefore serves as a consumer protection measure.

The evidence also showed that the registration and labeling program would help ensure that those transporting and disposing of waste in Indiana can be held accountable for compliance with Indiana's laws. Indiana policymakers received extensive information showing systematic and widespread violations of solid waste laws, *e.g.*, Tr. 5 at 798-99; but the industry's *ad hoc* and impromptu transactions are structured so that it is very difficult for Indiana to identify violators and hold them accountable, Tr. 5 at 731-32. The registration law was therefore in Indiana's view the "key to enforcement" of many solid waste laws. Tr. 5 at 731.

E. Effects on Interstate Commerce

The evidence showed that municipal waste generated in Indiana is generally not crosshauled but is usually shipped in traditional dedicated garbage trucks. By contrast, many long-distance interstate shipments are carried on multipurpose dry vans. Interstate shipments of waste to Indiana use flatbed trailers and open-top dump trailers as well. App. 43. There was no evidence that the backhauling law would adversely affect interstate shipments in any vehicles other than dry vans. In addition, trash can be and is hauled in "semi-dedicated fleets" in interstate commerce. Dep. 6 at 6, 8; Tr. 3 at 350-54. Dedicated fleets exist for many commodities, including automobiles, heavy machinery, milk,

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[4](...continued)
include bacteria, viruses, molds, and yeasts that come from, among other things, decomposing food wastes, fecal matter in used disposable diapers, discarded syringes, and sickbed wastes. In addition, the insecticides, pesticides, cat litter, cleaning agents, and solvents, which may be found in garbage, contain toxic chemicals and poisons, many of which may cause acute or chronic health problems." Pl. Ex. 7 at 40.

petroleum products, and livestock, as well as municipal waste. Dep. 1 at 84-85; Dep. 6 at 9-11.

The evidence showed that if a truck hauling garbage to Indiana could not get a return cargo of an exempt commodity, then the truck would need to return empty. Under that scenario, the cost of shipping garbage to Indiana would increase from about $35 a ton to about $70 a ton. App. 54-55. The total cost of disposing of trash in Indiana would still be lower than disposal on the East Coast, but Indiana would no longer be the cheapest disposal site. *Id.*[5]

The brokers also argued that the registration and labeling program burdened commerce by requiring advance registration and imposing a flat fee of $100 per company, plus $1.50 per vehicle for stickers. The evidence showed that the registration fees were set only to cover the estimated cost of the registration program itself, and not to raise additional money or to stop imports. Pl. Exs. 6 & 16.

III. The District Court's Decision

The district court reviewed this Court's dormant Commerce Clause decisions to identify possible standards of review. The court held that State laws that discriminate against interstate commerce are subject to strict or "elevated scrutiny," which requires the State

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[5]As the district court noted, respondents *claimed* that the effect of the law would be "to eliminate the interstate transportation of waste to Indiana." App. 55. But contrary to the court of appeals' inaccurate statement, the district court made no *finding* that the statutes "would effectively bar the importation of out-of-state waste into Indiana." *Cf.* App. 34. In fact, affidavits filed in opposition to respondents' motions for injunction pending appeal showed that out-of-state entities, including truckers who hauled garbage frequently for the respondents, registered more than 2,500 vehicles for hauling garbage for disposal in Indiana under the new laws. Supplemental Affidavit of Timothy J. Method, filed with Seventh Circuit on Feb. 7, 1992, with "Appellees' Memorandum in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal"; Affidavit of Timothy J. Method, filed with district court as part of R. 148 (hereinafter "Method Affidavits").

to justify the discrimination by showing (1) the statute serves a legitimate local purpose, and (2) there are no adequate, nondiscriminatory alternatives. *See* App. 50 (*citing, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). But State laws that do not discriminate, the court said, "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." App. 50 (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In deciding to apply the *Pike* test to both the backhauling and the vehicle registration statute, the district court recognized that both Indiana statutes here are facially neutral. The court then followed this Court's analysis in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-88 (1987):

> The backhauling ban is a facially neutral statute. It treats similarly situated waste haulers alike, regardless of their residence or the origin of the wastes they carry. Neither intrastate or interstate waste haulers may crosshaul municipal waste and any non-exempt item. However, Indiana-generated municipal waste generally is not crosshauled -- that is, trash is usually shipped intrastate in traditional, dedicated garbage trucks, not dry vans. Thus, the plaintiffs argue that the effect of the statute is discriminatory. As noted above, a statute is not discriminatory if it will apply identically -- even though most often -- to out-of-state entities. Because nothing in the Indiana Act imposes a greater burden on out-of-state haulers than it does on similarly situated Indiana haulers, the backhauling ban does not discriminate against interstate commerce and the *Pike* test applies.

App. 52-53 (footnote omitted). The district court applied the same analysis to the vehicle registration statute. Because the provision treats interstate and local businesses similarly, and there was no evidence that an Indiana entity would benefit economically from the statute, the court held that *Pike* also applied to this statute.

The district court found the backhauling law would serve two legitimate purposes. First, the court found that "even commercial entities that are not involved in food products do not want their products transported in trucks that previously hauled trash." App. 54. The court did not presume to judge the wisdom or rationality of the public's aversion to products associated with garbage, but it found that "the shippers' reaction to public concern was rational." *Id.* The court therefore found "the commercial reputation of Indiana products will be protected if the products are not shipped in trucks which have previously carried trash." *Id.*

Second, in the face of conflicting evidence on health risks, the court held that the legislature is "not required to wait for scientific verification and the publication of learned articles before acting to alleviate what its constituents perceive as a health risk," App. 53-54, and found that the legislature acted "well within its rights to determine that backhauling poses health risks," App. 55.

The court also found that while the backhauling statute could raise costs for some types of interstate waste shipments, disposing of trash in Indiana would still be significantly cheaper than disposal on the East Coast, and that lower profits did not constitute a "clearly excessive burden on interstate commerce." App. 55.

Turning to the vehicle registration program, the court found that it would assist public enforcement of the backhauling law, and would help shippers privately insist on compliance with the backhauling law and give them information they want. App. 57. It also found that the program would "eliminate the practice of making impromptu contracts to haul trash," and that it was "written to do this because this *ad hoc* procedure makes it very difficult to identify, and hold accountable, those who violate an Indiana law." App. 58. The court further found that "greater accountability of those who haul trash is a local benefit," and that Indiana would benefit from "greater accountability of the entities involved in the disposal of municipal waste." App. 58, 59. On the "burden" side, the court found that the *ad hoc* and impromptu business arrangements preferred by the brokers were "particular methods of operation" not protected by the Commerce Clause. App. 58 (*citing CTS*, 481 U.S. at 94).

The district court therefore entered judgment upholding the backhauling law and the vehicle registration and labeling laws.[6]

IV. The Court of Appeals' Decision

The Seventh Circuit recognized that both statutes are facially neutral. Quoting this Court's opinion in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1979), however, the court of appeals said the "critical consideration is the overall effect of the statute on both local and interstate activity," and whether the "effect is to favor in-state economic interests over out-of-state economic interests." App. 19. The backhauling statute would raise shipping costs for those using multipurpose trucks who cannot locate exempt return cargoes. The panel reasoned that, because multipurpose trucks are generally used for interstate shipments, while Indiana waste is already generally transported in dedicated garbage trucks, the law discriminated against interstate commerce "in practical effect." App. 21. The court then struck down the backhauling law because Indiana had failed to prove "the *necessity* of the measures and the absence of less discriminatory alternatives." App. 23 (emphasis added).

Turning to the role of the vehicle registration program in the absence of the backhauling law, the Seventh Circuit recognized that Indiana has a legitimate interest in protecting against consumer deception. Without specifying the standard it was applying, the panel concluded the law would be less effective because it was limited to trucks that dispose of waste in Indiana, and did not regulate trucks that dispose of waste in other States. App. 24. The court did not address the benefits of accountability.

The court then held that the $100 registration fee per company is unconstitutional under the reasoning of this Court's flat tax decisions. App. 25 (*citing American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987)). The court of appeals had concluded earlier that the Tax Injunction Act, 28 U.S.C. § 1341,

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[6]The district court upheld two other laws and struck one down. Only the backhauling and vehicle registration and labeling laws are before this Court.

did not bar federal jurisdiction over the challenge to the registration fees "because their purpose is regulatory rather than revenue-raising." App. 4 n.2. On the merits, however, the panel applied the constitutional standards applicable to taxes.

At the end of its opinion, the court of appeals turned briefly to the *Pike* test as an alternative basis for its decision. The court said that Indiana's interests in the backhauling statute all boiled down to commercial reputation, and that in so doing, Indiana was "bowing to unreasoned public opinion." App. 33. It also held that the statutes would "further their stated purpose only marginally" because they do not apply to trucks that dispose of waste in other States. App. 33-34. Weighing what it considered to be marginal benefits against what it viewed as an effective bar to waste imports -- a view it inaccurately characterized as a district court finding -- the court held the statutes invalid under the *Pike* test. App. 34.

REASONS FOR GRANTING THE PETITION

The Indiana laws that forbid backhauling, and require garbage trucks to be registered and labeled as garbage trucks, are neutral. They apply the same rules to interstate and intrastate commerce alike. As the district court found, they serve legitimate State interests by protecting the commercial reputation of Indiana products, by protecting against potential health risks, and by promoting accountability and compliance with Indiana laws regulating the waste industry. The court of appeals erred by subjecting these neutral laws to strict or elevated scrutiny, and by using the Commerce Clause as a vehicle to substitute its policy judgments for those of the Indiana legislature.

The Commerce Clause does not protect the supposedly "natural" functioning of markets. Nor does it lock in place the particular methods of operation preferred by businesses prior to enactment of the law. The Seventh Circuit therefore erred by applying a new "disparate impact" theory of discrimination under the Commerce Clause. When this Court has reviewed facially neutral laws, it has consistently rejected such theories of discrimination, and held that a State law is not subject to strict or elevated scrutiny simply because it has a greater impact on interstate commerce than on local commerce.

However, language in some of this Court's opinions striking down facially *discriminatory* laws appears to lend support to the "disparate impact" theory, and the circuits have reached conflicting results in trying to interpret it. This Court should grant *certiorari* not only to reverse the Seventh Circuit's error, but also to clarify the standards for reviewing facially neutral laws under the dormant Commerce Clause. Absent such clarification, the Clause threatens to be used, as it was below, as an unpredictable device for invalidating neutral State laws, guided not by a meaningful constitutional standard, but only by a court's economic judgment about the relative "disparity" of a statute's "practical impact."

The Seventh Circuit also erred by reading this Court's opinion in *Pike v. Bruce Church, Inc.* as a license to engage in legislative balancing and policymaking. While the panel denied it was doing so, it plainly substituted its judgment for the legislature's in dismissing Indiana's interests as "bowing to *unreasoned* public opinion"; in treating the laws as "underinclusive" because they do not purport to govern activity in *other* States in ways that would have imposed greater "burdens" on interstate commerce; and in finding the State's interests not sufficiently compelling because (in the panel's view) "market forces alone will operate adequately to protect Indiana's interests."

The balancing language in *Pike* is broad, but this Court has never taken that language out of context and used it to strike down a facially neutral law that served legitimate purposes and posed no threat of multiple and conflicting State regulation. This Court should therefore explain or limit *Pike* to make clear that the Commerce Clause does not authorize the courts to "second-guess the empirical judgments of lawmakers" in reviewing evenhanded laws. *See CTS*, 481 U.S. at 92.

I. The Commerce Clause Does Not Subject Facially Neutral Statutes To A "Disparate Impact" Test.

A. This Court Has Rejected "Disparate Impact" Claims Of Discrimination Under The Commerce Clause.

The Seventh Circuit based its disparate impact theory on phrases taken from this Court's opinions striking down facially

discriminatory statutes. When this Court has squarely confronted the question regarding facially neutral statutes, however, it has consistently rejected the "disparate impact" theory.

In *CTS*, *supra*, the Seventh Circuit had struck down another facially neutral Indiana law, one regulating shareholders' voting rights. This Court rejected a discrimination claim based on the theory that the "practical" impact of the law would fall most heavily on tender offers made by out-of-state entities:

> [The Indiana Act] has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis v. BT Investment Managers, Inc.*, [447 U.S. 27, 36 (1980).]
>
> Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." * * * *Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.*

481 U.S. at 88 (emphasis added; citations omitted).

In rejecting the disparate impact theory of discrimination, *CTS* cited and followed *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978), which upheld a facially neutral law that applied, in operation, *only* to out-of-state companies; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981), which upheld a facially neutral ban on use of plastic milk jugs although all plastic resin was imported; and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981), which upheld a tax on coal, 90% of

which was paid by nonresidents. *Accord*, *Breard v. Alexandria*, 341 U.S. 622, 637-41 (1941) (upholding facially neutral limits on door-to-door solicitation although that was preferred method for interstate businesses); *Packer Corp. v. Utah*, 285 U.S. 105, 111-12 (1932) (upholding limits on tobacco advertising although tobacco and banned posters were imported).

Although the district court relied on *CTS* in finding that these laws do not discriminate, the Seventh Circuit did not even address *CTS*. Instead, it based its disparate impact analysis on this Court's references in *Brown-Forman Distillers* to "the overall effect" and "the effect" of the law, 473 U.S. at 579, and on decisions striking down laws whose application turned on geographic boundaries. Despite phrases referring to "overall effect" or "practical impact," however, this Court simply has not applied disparate impact analysis to Commerce Clause cases.[7]

The court of appeals also supported its discrimination analysis with *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977). In that case a North Carolina law prohibited the use of other States' apple grading systems in North Carolina. North Carolina claimed the law prevented consumers from being deceived or confused. This Court said the law discriminated because it raised costs for out-of-state competitors and denied them a competitive advantage they had developed because the Washington grading system was superior to all others. 432 U.S. at 350-52.

Taken at face value, that portion of the *Hunt* opinion lends some support to the Seventh Circuit's view. But to treat *Hunt* as a

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[7]This Court has, of course, struck down as discriminatory State laws that regulate on the basis of geography. The link is crystal clear between interstate commerce and the 5-mile limit in *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), the 100-mile limit in *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891), and the county lines in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ___, 112 S.Ct. 2019, 119 L.Ed.2d 139, 149 (1992). But this Court has never extended these geography cases to laws which regulate practices or products found more often in interstate than in local commerce. It certainly has not treated State laws as discriminatory where they regulate on a basis found, as the district court found here, to serve legitimate local interests.

general endorsement of a "disparate impact" test would place it squarely in conflict with *CTS* and the cases cited there, all of which rejected similar theories of discrimination.

Upon close analysis, therefore, *Hunt* should be considered a case in which the State simply failed to show that the facially neutral law served *any* legitimate purpose. If North Carolina had shown that Washington growers had gained their "competitive advantage" by genuinely deceptive or dangerous practices, a neutral law barring those practices surely would not have been struck down as "discriminatory." The real problem was that despite North Carolina's claim that it was preventing consumer deception and confusion, the record showed, and the district court found, that the law actually *deprived* buyers of information they wanted. 432 U.S. at 353-54. The lack of any legitimate benefit was the real key to the decision. Otherwise, *Hunt* could not be reconciled with *CTS* and the other cases which rejected "disparate impact" arguments.

B. The Circuits Are In Conflict Over Whether The Dormant Commerce Clause Incorporates A "Disparate Impact" Test To Judge Facially Neutral Regulatory Statutes.

The courts of appeals have struggled with the references in this Court's opinions to the "overall effect" or "practical effect" of a challenged law, and whether they create a "disparate impact" theory requiring strict scrutiny under the dormant Commerce Clause. Most circuits, however, have rejected such a constitutional test.

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987), upheld a law that applied in practice to only one out-of-state firm. The Third Circuit acknowledged that it had "some difficulty" in understanding this Court's Commerce Clause decisions that use the phrase "discriminatory effects." *Id.* at 400. Nevertheless, after reviewing this Court's opinions, the *Oberly* court held that "until we receive further guidance from the Supreme Court, we believe that the 'discriminatory effect' cases are best regarded as cases of purposeful discrimination." *Id.* The Third Circuit thus rejected the argument that strict scrutiny is proper once the court finds that the statute in question mostly hurts interstate businesses. The court

instead concluded that heightened scrutiny is not proper under the dormant Commerce Clause simply because "out-of-state interests bear the brunt of state action." *Id.* at 402. *Accord, Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1294 (3d Cir. 1992).

The Ninth Circuit also rejected the disparate impact theory in *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990), and upheld a facially neutral Nevada statute governing the charges Nevada banks could assess for transactions performed at automatic teller machines. Out-of-state banks claimed the Nevada statute affected more out-of-state interests than in-state interests, but the court rejected the contention that such a disparate impact means that the statute is "discriminatory" under the Commerce Clause. Relying on this Court's decision in *CTS*, *supra*, the Ninth Circuit stated: "[A] state law is not 'discriminatory' under the commerce clause simply because it applies most often to out-of-staters. . . . Under *CTS*, even a disproportionate effect on out-of-state residents and banks by the Nevada Act does not necessarily violate the commerce clause." *Id.* at 1193.[8]

Three other circuits have rejected the "disparate impact" theory of discrimination. In *National Solid Wastes Management Ass'n v. Alabama Dept. of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), *vacated in part on other grounds*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 115 L.Ed.2d 973 (1991), the Eleventh Circuit ruled that strict scrutiny is improper under the Commerce Clause "[w]here the challenged state action does not on in its face discriminate against interstate trade." *Id.* at 724. Likewise, the First and Second Circuits look to the face of State laws to see if out-of-state entities are the target of discrimination; if there is no such discrimination, then the First and Second Circuits apply minimal scrutiny. *See, e.g., Sadler v. NCR Corp.*, 928 F.2d 48, 55 (2d Cir. 1991) (no discrimination where shareholder rights' law applies to foreign and domestic corporations alike); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 844 (1st Cir. 1988)

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[8]The Ninth Circuit's analysis and reliance on *CTS* are in accord with the district court's reasoning in this case. *See* App. 52-53.

(tender offer statute is "non-discriminatory because it applies equally to both intrastate and interstate offerors").

Indeed, until this case, the Seventh Circuit had apparently rejected a "disparate impact" theory of discrimination under the Commerce Clause. In *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989), the Seventh Circuit upheld Wisconsin's antitakeover corporation law. The court noted that the facially neutral law undoubtedly applied more often to bidders "located outside of Wisconsin," but it held that "unless the law discriminates according to residence [a disparate impact on non-residents] does not matter." 877 F.2d at 506. In this case, the Seventh Circuit changed its mind and applied strict scrutiny because out-of-state concerns are more often affected by Indiana's backhauling law.

The circuits have asked for "further guidance from the Supreme Court" (*Oberly*, 822 F.2d at 400) on the issue whether the dormant Commerce Clause incorporates a disparate impact test of discrimination. The validity of the statutes here turns squarely on this question, providing a straightforward opportunity to provide the needed guidance.

C. The "Disparate Impact" Test Would Give Special Preference To Interstate Commerce Over Local Commerce, And Would Effectively Prevent States From Protecting Their Legitimate Interests.

The Seventh Circuit's "disparate impact" theory misunderstands the Commerce Clause at a basic level. While the "principal objects of dormant Commerce Clause scrutiny are statutes which discriminate against interstate commerce," *CTS*, 481 U.S. at 87, the Commerce Clause does *not* give interstate commerce any privileged or preferred status over local commerce.

Justice Holmes wrote long ago: "A man cannot acquire a right to property by his desire to use it in interstate commerce. Neither can he enlarge his otherwise limited and qualified right to the same end." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). That statement captures a foundation of Commerce Clause law: While States generally may not

discriminate against interstate commerce, they are not required to exempt interstate commerce from legitimate exercises of their police power, even if it is harder or more expensive for interstate companies operating in a State to comply with that State's laws. *See, e.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960).

There can be no doubt that the Indiana legislature may, in the exercise of its police power, restrict the practice of backhauling as applied to waste shipments which both begin and end in Indiana. The backhauling law here does just that, and it applies the same rules to interstate commerce. It applies the same rules to all shipments that end in Indiana, regardless of where they begin. The court of appeals' "disparate impact" theory, however, would require Indiana to *exempt* interstate shipments from its laws, at least where the regulated practice is more prevalent in interstate commerce.

But few laws will have precisely proportionate effects at any given moment on both local and interstate commerce. If embraced by the federal courts, the "disparate impact" theory would undermine the ability of States to act to protect legitimate interests affected by those engaged in interstate commerce. Contrary to the decisions of this Court, that theory would use the Commerce Clause to protect "particular methods of operation" and the supposedly "natural" functioning of particular markets. *See CTS*, 481 U.S. at 92; *Exxon*, 437 U.S. at 127-28. The laws affecting tender offers in *CTS*, restructuring gasoline markets in *Exxon*, taxing coal in *Commonwealth Edison Co. v. Montana*, and prohibiting plastic milk jugs in *Clover Leaf Creamery*, would all have been struck down under that theory.

Similarly, most tobacco sold in Indiana is imported; but surely that fact would not subject to elevated scrutiny any Indiana law that discouraged, taxed, or regulated tobacco use. *See Austin v. Tennessee*, 179 U.S. 343, 350, 362 (1900) (upholding neutral ban on sale of cigarettes). Nor does Indiana have oceanfront property or gold mines; yet surely Indiana could enforce laws aimed at protecting its citizens from deceptive sales tactics used by sellers of oceanfront property or stock in gold mines. Nor does Indiana have domestic sources of cocaine or coca leaves -- all cocaine in

Indiana has presumably moved in foreign and interstate commerce. But surely Indiana's power to prohibit sale or use of cocaine does not depend on the grace of federal legislation!

The Commerce Clause does not enshrine any particular economic theory about how a given market "should" function. *E.g.*, *CTS*, 481 U.S. at 92; *Exxon*, 437 U.S. at 127-28; *see also Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). It certainly does not lock in place the particular practices, methods of operation, and market structures that evolved before the new law's enactment, under a different set of regulatory and market conditions. *See CTS*, 481 U.S. at 92; *Exxon*, 437 U.S. at 127-28. The Seventh Circuit's disparate impact analysis, however, invades the State's authority for the sake of protecting only such methods of operation that some businesses prefer.

The error is illustrated by applying the panel's reasoning to other laws of unquestioned validity. For example, States now routinely prohibit such practices as open dumping of garbage, and transportation of uncovered waste that can blow onto the highway. States did not always prohibit those practices; but no one could credibly claim that such prohibitions violated the Commerce Clause if, prior to their adoption, interstate trash haulers had engaged in open dumping or transporting uncovered loads of waste more often than their local counterparts. Yet the "disparate impact" of such statutes on interstate haulers, and the new costs imposed upon them, would be analytically no different from the effect of the Indiana statutes here.

The only difference is that open dumping laws and covered-load laws are familiar. The facially neutral laws here are relatively new. They address problems that arise from the novel practice of backhauling with garbage trucks. But that "difference" is utterly irrelevant to proper analysis of the dormant Commerce Clause. The Indiana legislature has deemed the practice of hauling both garbage and most other products on the same trucks offensive, harmful, and potentially dangerous. Indiana's power to regulate that practice should not depend on whether the practice is more prevalent at the moment in interstate or local commerce, any more than its power to prohibit open dumping or to require covered loads would depend on such a "disparate impact" analysis. The Seventh

Circuit therefore made an important error when it found the law discriminatory on a theory of "disparate impact."

II. Because The Indiana Laws Are Evenhanded And Serve Legitimate Interests, They Should Be Upheld Under Any Balancing Test.

In *Pike* this Court said:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. at 142. That broad language *can* be read as an invitation for courts to make essentially legislative decisions, balancing the benefits a law gives one group against the burdens it imposes on another. *See CTS*, 481 U.S. at 95 (Scalia, J., concurring). And some courts have indeed taken *Pike* as a mandate for such balancing, as (despite its disclaimer) the Seventh Circuit did here.

But in fact, this Court has not used the *Pike* "balancing" test in that way. Discrimination has always been the touchstone of this Court's Commerce Clause analysis. Even *Pike* itself involved a facially discriminatory statute that required certain operations to occur within the State. 397 U.S. at 146. And since *Pike* was decided, this Court has struck down many such facially discriminatory statutes whose application depended directly upon a State border or the residence of the regulated party.

As to facially *neutral* statutes, however, only three have been struck down by this Court in the years since *Pike*. In each case the Court's decision turned on factors (not present here) that minimized the role of any legislative policy judgments in the constitutional analysis.

For example, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), the Court invalidated a length limit on trucks where the State made no effort to show any contribution to safety,

and there were numerous exceptions for the benefit of local interests. 434 U.S. at 437-38, 446-47. In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), the Court struck down another truck length limit. There was no majority opinion, but the plurality gave great weight to the law's exceptions for the benefit of local interests. 450 U.S. at 676-77. And in *Hunt v. Washington Apple Commission*, *supra*, the Court struck down a prohibition on the use of any State's apple grades. As shown above, the Court treated the law as discriminatory, but the decisive factor was the State's failure to show *any* legitimate benefit from the law. Rather than preventing consumer deception, the law deprived apple buyers of information they considered valuable. 432 U.S. at 353-54.[9]

In short, this Court has in practice used the *Pike* balancing test to strike down only laws that served no legitimate purpose and/or were riddled with loopholes for the benefit of purely local interest. In this case, however, the district court *found* that the backhauling and vehicle registration laws in fact serve the State's interests, and there are no local biases in the laws' exceptions and limitations.[10]

When the Seventh Circuit turned briefly to the *Pike* test, however, it made several points that showed it was merely second-guessing the legislature's policy judgments. First, the court dismissed Indiana's effort to protect its products' commercial

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[9]*CTS* also recognized a statute can violate the Commerce Clause by subjecting interstate commerce to multiple and conflicting laws. 481 U.S. at 88-89. Classic examples are the conflict in mudflap laws in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), or train lengths in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774 (1945). Neither the district court nor the court of appeals found any such conflicts or need for national uniformity here. The backhauling law is triggered only by dumping garbage in Indiana, and applies only to later hauls that begin in Indiana.

[10]Plaintiffs argued at trial that some details were "discriminatory" under the *Kassel* plurality's approach, but those arguments were all rebutted with evidence and argument. *See* R. 114 at 104-12. The district court did not specifically address those arguments, and respondents did not pursue them on appeal.

reputation as "bowing to unreasoned public opinion" App. 33. That attitude is profoundly wrong. The reality in the marketplace is that consumers do not want goods tainted by garbage, and businesses respond to that preference. As the district court explained: "Maybe the public's reaction is irrational, but the shippers' reaction to public concern was rational." App. 54. The evidence on this score was overwhelming and undisputed. *See supra* note 3.[11]

More fundamental, though, by what conceivable warrant does a federal court dismiss as "unreasoned" the public opinion to which a State legislature responds? With all due respect, unless and until either the respondents or the Seventh Circuit can persuade the world that hauling garbage and other products in the same trucks is harmless and inoffensive, that public opinion still *exists*. Indiana is entitled to protect its pocketbook, and its citizens' pocketbooks, from the effects of that opinion, regardless of whether the federal courts view it as "rational" or "irrational." Courts' opinions about the wisdom of consumers' undisputed preferences, and the wisdom of a State legislature's responses to them, have no place in the constitutional analysis.

Second, the court of appeals dismissed Indiana's interest in protecting health as no more than an interest in protecting the commercial reputation of Indiana products. App. 33. That conclusion was based on the faulty premise that Indiana has no legitimate interest in protecting the health of citizens of other States. App. 22. This Court has never used the Commerce Clause to *promote* a parochial view in which a State's only legitimate interest is the welfare of its own citizens. *See CTS*, 481 U.S. at 93.

To be sure, a State cannot regulate transactions between nonresidents or other events beyond its borders for the sake of citizens of other States. *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (Illinois had no interest in protecting nonresident

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[11]The district court did *not* find that public reactions to the practice were irrational. In view of the uncertainties about health risks, public reactions were perfectly rational, especially if a consumer considers the trivial benefits from backhauling.

shareholders in out-of-state transactions with other nonresidents). But a State has always had the power to protect people *anywhere* from harm resulting from activity in that State. Just as Indiana may impose strict sanitation rules for milk trucks in Indiana, regardless of whether they will cross State lines, so too may Indiana restrict backhauling in Indiana for the sake of shippers and their customers anywhere.

Most curious of all, the Seventh Circuit criticized Indiana for applying these laws only to trucks that dispose of waste in Indiana, on the theory that trucks which dispose of waste elsewhere but then pick up other goods in Indiana can pose the same threats. App. 33. True enough; but any effort to regulate trucks based upon their activities in *other* States would obviously impose *greater* burdens on interstate commerce. Perhaps Indiana could do that; but such a law would also, at a minimum, raise serious constitutional questions under this Court's decisions on State statutes with extraterritorial effects. Surely Indiana cannot be faulted, under some novel theory of "underinclusiveness," because it did not enact a law imposing greater burdens on interstate commerce and possibly extending beyond its constitutional power.[12]

The court of appeals also minimized Indiana's interest in protecting commercial reputation and preventing deception based on the district court's finding that "several trucking companies have semi-voluntarily discontinued their waste hauling activities because shippers told them to." App. 46. From this the court of appeals declared: "Thus it appears that market forces alone will operate adequately to protect Indiana's interests." App. 23. If that sweeping statement were correct, then the statutes do no harm. But even if it were correct, the Commerce Clause does not require States to rely *solely* on market forces to protect their interests.

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[12]Indiana also said at oral argument below that there would be serious difficulty in administering either law as applied to trucks that dispose of waste elsewhere. The court of appeals noted that "nothing in the record supported that contention." App. 24. However, there was nothing in the record because respondents never suggested that Indiana should have enacted this hypothetical law with greater burdens. The suggestion was first raised by the court of appeals itself at oral argument.

"The Constitution does not require the States to subscribe to any particular economic theory." *CTS*, 481 U.S. at 92.

Finally, the court of appeals announced on the "burden" side that enforcement of the statutes "would effectively bar the importation of out-of-state waste into Indiana." App. 34. Although respondents made that claim, the district court made no such finding. The district court found that the backhauling law would raise costs and force changes in some *ad hoc* methods of operation, but the Commerce Clause does not protect a particular profit margin from evenhanded legislation. The court did *not* find that waste imports would stop. In view of the potential for rapid changes in markets and other States' regulatory regimes, such a finding could not be supported. Moreover, the evidence before the court of appeals on respondents' emergency motion for an injunction pending appeal showed that a large number of interstate businesses were prepared to continue waste imports under these laws. By the day after the district court's decision, companies from 16 other States and one Canadian province had registered more than 2,500 vehicles. Method Affidavits, *see supra* note 5.

The Commerce Clause does not authorize the exacting scrutiny and second-guessing of legislative judgments exhibited in the panel's opinion when dealing with statutes that apply the same rules to both interstate and local commerce. The Seventh Circuit's views about whether public opinion is "reasoned" or not, about the wisdom of limiting the statute to waste disposed of in Indiana, and about the success of self-help in the market, are not controlling. To the extent that *Pike's* balancing language may suggest otherwise, it should be reconsidered and limited.

Indiana does not suggest that Commerce Clause analysis begins and ends with facial discrimination. But at least where a facially neutral law (a) serves legitimate State interests (as found here by the district court), (b) poses no threat of multiple and conflicting regulation, and (c) is not riddled with loopholes for purely local benefit (as in *Raymond Motor* and *Kassel*), the law should be upheld. If a legislative judgment suggests the law is too burdensome, Congress -- not the courts -- is the branch of the federal government with the Commerce Clause power to correct the problem.

III. Regulatory Fees Should Not Be Subject To "Flat Tax" Analysis.

By extending the reasoning of this Court's recent "flat tax" decisions beyond taxes to a purely regulatory fee, the court of appeals erred on another important question. If mere registration fees must be proportionate to the magnitude of interstate businesses' in-state activities, then a wide array of modest State fees fixed at easy-to-administer flat rates will suddenly be vulnerable to Commerce Clause challenge.

In striking down the fees, the court of appeals relied on this Court's 5-4 decision in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), which struck down State "axle taxes" on trucks because they imposed a much higher cost per mile traveled on interstate trucks than on local trucks. However, nothing in *Scheiner* would support its extension beyond taxes to modest regulatory fees that are not designed to raise revenues.[13]

In fact, it is ironic -- and indicative of the Seventh Circuit panel's economic and legislative hostility to these laws -- that in order to hold that it had jurisdiction over the merits of the claim and that the Tax Injunction Act, 28 U.S.C. § 1341, did not apply, the panel distinguished the fee from a tax precisely because its purpose is *only* regulatory. App. 4 n.2. Yet on the merits the panel reverted to, and impermissibly extended, the constitutional standards that apply to taxes.

This Court, however, has distinguished between taxes and regulatory fees for Commerce Clause purposes, and has not invalidated registration fees designed solely to offset the cost of the registration program to which they pertained. *See Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187 (1937) (upholding registration fee on

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[13]The court of appeals also relied upon *Nippert v. Richmond*, 327 U.S. 416, 427-29 (1946), which struck down a city's flat annual licensing fee on salespersons and noted that the fee would be prohibitive for small operators, and "casual or occasional" out-of-state operators. Nothing in *Nippert* suggests, however, that a State cannot charge a flat regulatory fee calculated to cover the cost of the regulatory scheme.

cosmetics sold in the state); *Smith v. Alabama*, 124 U.S. 465, 480 (1888) (upholding examination and licensing fee of five dollars for railroad engineers). In *Smith*, the Court expressly distinguished such fees from taxes for purposes of Commerce Clause analysis, stating: "The fee of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation." *Id.* The Seventh Circuit's error on this issue, founded on a new theory of broad application, is yet another reason to grant certiorari.

CONCLUSION

In preserving the balance of power in our federal system, the federal courts have no task more delicate than reviewing the constitutionality of State statutes. The challenged Indiana statutes here apply exactly the same rules to interstate and local transactions. They restrict harmful business practices, and in so doing they serve Indiana's legitimate interests in commercial reputation, health, and enforcement of its solid waste laws.

In protecting the balance of State and federal power, the dormant Commerce Clause does not bar such laws. Rather, it prohibits discrimination, and protects against the risk of overlapping and conflicting regulation by more than one State, neither of which is present here. The Commerce Clause does not preserve a market's status quo, or preferred business practices, or profit margins, against the effects of neutral State laws that serve legitimate State purposes. Under the Constitution, whether laws' benefits outweigh their burdens, and whether laws reflect wise policy choices, are questions not for the federal courts but for the State and National legislatures.

This Court should therefore issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: November 9, 1992

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Petitioners,

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,

Respondents.

PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION OF THE COURT OF APPEALS:

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 92-1318, 92-1515

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INCORPORATED and JACK CASTENOVA, INCORPORATED,

Plaintiffs-Appellants, Cross-Appellees,

v.

HONORABLE EVAN BAYH, Governor of the State of Indiana, and HONORABLE KATHY PROSSER, Commissioner of the Indiana Department of Environmental Management,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 91 C 899—**Larry J. McKinney**, *Judge.*

ARGUED APRIL 27, 1992—DECIDED SEPTEMBER 17, 1992

Before CUMMINGS, EASTERBROOK, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs, who are brokers of municipal solid waste, arrange for trucks to haul waste from temporary storage sites in New York, New Jersey, and Pennsylvania to landfills in Indiana. Seeking a declaratory judgment and injunctive relief, they brought suit in the United States District Court for the Southern District of Indiana to challenge the constitutionality, under the Commerce Clause, of Indiana statutes regulating the

trucking of municipal waste. The district court upheld all but one of the provisions at issue, and the plaintiffs appeal. The defendants cross-appeal, challenging both the district court's determination that the plaintiffs had presented a controversy ripe for review and its determination as to the one provision struck down. For the reasons set forth in this opinion, we reverse in part and affirm in part.

I
BACKGROUND

A. *The Challenged Provisions*

The plaintiffs challenge a set of statutory provisions regulating the transport and disposal of municipal waste in Indiana. According to the plaintiffs, the challenged provisions, which were enacted as a package in 1991, are aimed at reducing or eliminating, and will in fact reduce or eliminate, the disposal of out-of-state waste in Indiana.

1. The backhaul ban

Under Indiana Code § 13-7-31-13.1, trucks that are used to haul municipal waste to Indiana landfills or disposal facilities may be used to haul only a limited number of other items. The statute provides that "municipal waste collection and transportation vehicles"[1]

[1] Such vehicles are defined in Ind. Code 13-7-31-3:

> Sec. 3. (a) As used in this chapter, a "municipal waste collection and transportation vehicle" means a truck or railroad car used to transport municipal waste from a solid waste generator or a solid waste processing facility to a:
>
> (1) solid waste processing facility in Indiana; or
>
> (2) solid waste disposal facility in Indiana.
>
> (b) The term does not include a vehicle that is
>
> (1) used to transport municipal waste from a residence if the vehicle is owned, leased or operated by an individual who lives in the residence; or
>
> (2) not used for commercial solid waste transportation.

may only be used to collect and transport the following:

(1) Municipal waste.

(2) Special waste (as defined in 329 IC 2-2-1 as in effect January 1, 1990).

(3) Hazardous waste regulated under:

(A) IC 13-7-8.5; or

(B) the federal Solid Waste Disposal Act (42 U.S.C. 6901 et seq. as in effect January 1, 1990).

(4) Waste described under IC 13-1-12-9 that results from the combustion of coal.

(5) Material that is being transported to a facility, except an incinerator or a landfill, for reprocessing or reuse.

(6) Wood, concrete, brick, and other construction and demolition materials.

(7) Dirt, sand, gravel, asphalt, salt, and other highway maintenance material.

(8) Coal, gypsum, slag, scrap metal, and other bulk industrial commodities.

(9) Infectious waste (as defined under IC 16-1-9.7-3).

Ind. Code § 13-7-31-13.1. The practical impact of this law is to require the use of semi-dedicated fleets of trucks to haul garbage to Indiana. As the district court stated, if this provision is enforced, "a significant number of the remaining truckers now willing to haul trash to Indiana will become unwilling because they cannot afford to dedicate their trucks to so limited a range of payloads." No. 91 C 899, Order at 16 (R. 132) (Feb. 5, 1992).

2. Vehicle registration and stickering

Indiana enforces its backhaul ban by requiring that municipal waste collection and transportation vehicles be registered with the Indiana Department of Environmental Management, Ind. Code § 13-7-31-8, and bear identification stickers. Ind. Code § 13-7-31-8.2(d). The Department must issue the registration and identification stickers within thirty days after receipt of the application. Ind. Code

§ 13-7-31-8(d). The registration must be renewed every two years, Ind. Code § 13-7-31-8.1(a), and the fee for registration or renewal is $100.[2] Ind. Code § 13-7-31-16.1(a)(1). A person who owns, leases, or operates more than one municipal waste collection and transportation vehicle need obtain only one registration listing all such vehicles. Ind. Code § 13-7-31-8.2(a). A copy of the current registration must be carried by each vehicle at all times. Ind. Code § 13-7-31-8.2(c). All vehicles must bear stickers:

> Vehicle identification stickers provided by the department, indicating that the vehicle carries municipal waste, must be affixed adhesively at all times in a prominent location on each side of each registered municipal waste collection and transportation vehicle's cargo compartment or, at the option of the person to whom the registration is issued, on each side of a truck cab of a vehicle.

Ind. Code § 13-7-31-8.2(d). Landfills are not permitted to accept a shipment of municipal waste if the vehicle carrying it does not have a vehicle identification sticker properly affixed. Ind. Code § 13-7-31-14(1).

3. Surety bond and disposal fees[3]

Indiana law also provides that "nonresident operators," that is, brokers like the appellants, managers of transfer

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[2] These fees are used to implement the waste disposal regulatory system to which registrants are subject. They do not revert to the state general fund. *See* Ind. Code § 13-7-31-16.5. Since their purpose is regulatory rather than revenue-raising, our jurisdiction over plaintiffs' challenge to them is not affected by the Tax Injunction Act, 28 U.S.C. § 1341. *See Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 670-71 (11th Cir. 1984); *Schneider Transp., Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

[3] The disposal fees, like the registration fee, are to defray the administrative and regulatory costs of Indiana's waste management program, which regulates the activities of the appellants. *See* Ind. Code § 13-9.5-5-1; Appellees' Br. at 70. Therefore our jurisdiction over the plaintiffs' challenge to them is proper. *See, supra*, note 2.

stations, or transporters of municipal waste, who are not residents of Indiana, must post a surety bond with the Indiana Department of Environmental Management. Ind. Code § 13-7-10.5-15. This provision is intended to "ensure the collection and payment of any civil penalties that the operator may be required to pay in Indiana because of the solid waste transfer activities of the operator." Ind. Code § 13-7-10.5-15(1)(B). The amount of the surety bond and the time for payment are to be determined under rules adopted by the Solid Waste Management Board. Ind. Code § 13-7-10.5-15(1)(A). Such rules have not yet been adopted. In addition, the nonresident operator is "considered to appoint the Secretary of State as the operator's agent for purposes of service of process in connection with any matter involving solid waste transfer activities." Ind. Code § 13-7-10.5-15(2).

Lastly, the appellants challenge Indiana's disposal fees. Indiana Code § 13-9.5-5-1 provides not only for fees that apply uniformly to all waste, regardless of origin, but also for fees that apply only to waste generated outside Indiana.[4] These latter fees are to be determined by rules

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[4] Ind. Code § 13-9.5-5-1 provides:

Sec. 1. (a) Beginning January 1, 1991, a fee is imposed on the disposal or incineration of solid waste in a final disposal facility in Indiana. Except as provided in section 6 of this chapter, the amount of the fee is as follows:

(1) For solid waste generated in Indiana and delivered to a final disposal facility in a motor vehicle having a registered gross vehicle weight greater than nine thousand (9,000) pounds, fifty cents ($0.50) a ton.

(2) For solid waste generated outside Indiana and delivered to a final disposal facility in a motor vehicle having a registered gross vehicle weight greater than nine thousand (9,000) pounds:

(A) fifty cents ($0.50) a ton; and

(B) if the solid waste management board has adopted rules under subsection (b), an additional amount imposed under the rules.

(3) For solid waste generated in Indiana or outside Indiana and delivered to a final disposal facility in a motor

(Footnote continued on following page)

to be adopted by the Solid Waste Management Board, and "shall be set at an amount necessary to offset the costs incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana." Ind. Code § 13-9.5-5-1(b). Rules have not yet been adopted.[5]

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[4] *continued*

> vehicle having a registered gross vehicle weight of not more than nine thousand (9,000) pounds or in a passenger motor vehicle (as defined in IC 9-13-2-123), fifty cents ($0.50) for each load delivered by the motor vehicle.
>
> (b) The solid waste management board shall adopt rules to establish and impose a fee on the disposal or incineration of solid waste:
>
> (1) generated outside Indiana; and
>
> (2) in a final disposal facility in Indiana; necessary to offset the costs incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana.
>
> (c) Revenue from fees collected under subsection (a)(1) and (a)(2)(A) shall be deposited in the state solid waste management fund established under section 2 of this chapter. Revenue from fees collected under subsection (a)(2)(B) shall be deposited in the hazardous substances response trust fund established by IC 13-7-8.7, except that any portion of the revenue that the solid waste management board finds is necessary to offset costs incurred by counties, municipalities, and townships shall be distributed to solid waste management districts (as defined in IC 13-9.5-1-10) pro rata on the basis of the district's population.
>
> (d) If solid waste has been subject to a fee under this section, the total amount of the fee paid shall be credited against any other fee to which the solid waste may later be subject under this section.

[5] The district court's ruling upholding a third provision against plaintiffs' facial challenge has not been challenged on appeal. That provision required uniform inspection of in-state and out-of-state transfer stations that receive waste destined for final disposal in Indiana. *See* Ind. Code § 13-7-10.5-16.

B. *Facts*

We give the facts as found by the district court. Indiana is an economically favorable disposal site for municipal waste from other regions of the United States. Indiana's first attempt to regulate the hauling of waste into Indiana was declared unconstitutional under the Commerce Clause in 1990. *See Government Suppliers Consolidating Serv., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). After this ruling, which was not appealed, Indiana enacted new provisions regulating the disposal of municipal waste. Those provisions are the ones at issue in the present case. The primary target of the provisions is a practice known as backhauling or crosshauling.

Truckers who haul municipal waste from the eastern United States to the Midwest normally are engaging in backhauling or crosshauling. The truckers haul goods from the Midwest to New York, New Jersey, or Pennsylvania; these trips (known as fronthauls) are a trucker's main source of income. Instead of returning to the Midwest with empty trucks, they haul back trash for disposal in midwestern landfills. Trash collected in eastern cities is stored temporarily in transfer and recycling stations. At these stations, the waste is compacted and bound into large bundles. Brokers (like the appellants) identify truckers looking for backhauls of trash and arrange a pick-up for them from a transfer station and also arrange for disposal of the trash in a landfill in Indiana (or another midwestern state). Flatbed trailers, box-type semi trailers, and open-top dump trailers are used to carry the trash to Indiana. An individual trucker may haul waste to Indiana only once in several years or may haul waste regularly. The brokers do not have long-term contracts with truckers; arrangements for transport of each load of waste are made on an ad hoc, one-time basis.

Many customers of trucking companies refuse to load their goods onto any vehicle that has hauled municipal waste. As the appellants candidly conceded before the district court, trucking companies would prefer that their other customers remain unaware that their trailers have

hauled municipal waste. Order at 32. Evidence at trial showed that even commercial entities that are not involved in food products do not want their products transported in trucks that previously hauled trash. These shippers were concerned about potential adverse effects on product reputation. Order at 27. Shippers, apparently thinking that if a truck is very clean it must have been recently washed after hauling garbage, have rejected trucks because they are too clean. As the district court noted, "this illustrates that shippers are more concerned with reputation than with the actual health risks." Order at 27 n.10. One trucker testified in the district court that he would not voluntarily tell a shipper that a trailer had previously hauled trash because of the stigma attached to crosshauling. Order at 32. However, in spite of pressure from shippers not to haul waste, "it is also clear that many truckers, especially small operators, are still willing to crosshaul trash. If the questioned provisions are enforced, then a significant number of the remaining truckers now willing to haul trash to Indiana will become unwilling because they cannot afford to dedicate their trucks to so limited a range of payloads." Order at 16.

The district court found that, unlike out-of-state waste, "Indiana-generated municipal waste generally is not crosshauled—that is, trash is usually shipped intrastate in traditional, dedicated garbage trucks, not dry vans." Order at 25.

Today a broker must pay a trucker approximately $35 a ton for hauling municipal waste from New York to Indiana. If a dedicated fleet of garbage trucks is used, the cost will double to about $70 a ton. Including a typical Indiana tipping fee of $15 per ton (the disposal fee that must be paid to the landfill), the total disposal cost of crosshauled trash is approximately $50 a ton. If a dedicated fleet is used, the total cost for disposing of New York waste in Indiana will be $85 a ton.[6] At $85 a ton,

[6] This is still less expensive than disposing of waste in eastern landfills, which costs about $125 a ton.

Indiana will no longer be the most economically reasonable state for the disposal of trash. According to the testimony of the brokers, transfer stations will not pay $85 a ton to dispose of waste; thus the backhauling ban, if enforced, will eliminate interstate transport of waste to Indiana. Order at 28.

C. *District Court Proceedings*

The district court first determined that the plaintiffs' challenges to all of the provisions described above were properly before it. It then examined the constitutionality of the prohibition on backhauling and the registration/stickering provisions as applied. The district court determined that the backhaul ban was facially neutral and applied identically to similarly situated waste haulers, regardless of their residence and the origin of the waste they carried. Therefore, it evaluated its constitutionality under the standard enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), noting that, under this standard, "a statute will not be held unconstitutional unless the burden imposed on commerce is clearly excessive in relation to the local benefits." Determining that the putative local benefits (protection of health and of the reputation of Indiana products) justified the burden on interstate commerce (lower profits for waste haulers), the court upheld the statute.

The district court also upheld the registration and stickering provisions. Noting that the statute does not distinguish on its face between local trash haulers and national waste disposal companies, the district court also found that it did not discriminate in practical effect. Moreover, the court noted, "there is no evidence that an Indiana entity will benefit economically from the registration/stickering provision so it does not constitute economic protectionism." Order at 31. According to the district court, the primary local benefit of the statute was to assist Indiana in enforcing its backhauling prohibitions. Also, registration and stickering would promote private enforcement

of the backhauling ban: "All sides agree that if shippers see the stickers, they will probably not use the truck. Thus, crosshauling will be effectively eliminated by private enforcement." Order at 31. The court rejected the plaintiffs' arguments that "sticker stigma" was a burden on interstate commerce; rather, it noted, "the dormant Commerce Clause does not give trucking companies a constitutional right to conceal information from their customers." Order at 32. In addition, the district court stated that, while "there [was] no doubt that enforcement of the vehicle registration greatly w[ould] change how the plaintiffs do business," Order at 33, the Commerce Clause does not protect a particular method of doing business. Lastly, the court rejected the plaintiffs' assertions that the registration and stickering requirements were duplicative and ineffective.

The district court reviewed the remaining two provisions at issue here, the disposal fee and surety bond, for facial validity. It upheld the disposal fee provision; however, it struck down the surety bond provision as an unnecessary burden on interstate commerce, noting that other provisions of the Indiana Code require out-of-state operators to register with the Indiana Department of Environmental Management, and that the registration process "should provide the state with all information it requires to adequately effectuate its judgments." Order at 40.

D. *Contentions of the Parties*

Government Suppliers and Castenova submit that the district court erred in upholding the backhaul ban, the registration and stickering provisions, and the disposal fees to be imposed on out-of-state waste. They contend that the court should have examined the backhaul ban and the registration and stickering provisions under what they denominate the "*per se*" test, that is, the elevated scrutiny applied by the Supreme Court where the statute in question is discriminatory on its face or in practical effect. *See, e.g., Brown-Forman Distillers v. New York State*

Liquor Auth., 476 U.S. 573 (1986); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

In a cross-appeal, Indiana submits that the plaintiffs' challenge to the backhauling ban should be dismissed for lack of a case or controversy and that the plaintiffs' challenges to the surety bond and the disposal fee are not ripe for judicial resolution, because as yet no implementing rules have been adopted. They also appeal the district court's determination that the provision requiring out-of-state operators to post a surety bond is invalid under the Commerce Clause.

II

JURISDICTION

"The appropriate test to determine if there is an actual controversy, one ripe for decision, under the Declaratory Judgment Act is the one stated in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941)." *Oneida Tribe of Indians v. State of Wisconsin*, 951 F.2d 757, 760 (7th Cir. 1991) (citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972)). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Maryland Casualty*, 312 U.S. at 273. Indiana submits that the district court erred in finding that it had subject matter jurisdiction over the claims asserted by Government Suppliers and Castenova. It argues that, in challenging the backhaul ban, the plaintiffs have presented "no concrete, justiciable controversy." Appellees' Br. at 41. We find little merit in Indiana's arguments on this point. Jurisdiction is clearly proper as to the backhaul ban and the registration and stickering provisions that accompany it. The plaintiffs do not themselves engage in backhauling; their business consists in arranging for others to do so. It is undisputed that their business would suffer severe adverse effects from enforcement of the backhaul ban.

Such economic injury, though indirect, is sufficient to confer standing. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). The interest they seek to vindicate is within the zone of interests protected by the Commerce Clause. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 267 (1983).

Indiana's contention that the plaintiffs presented only an abstract, and therefore unripe, question appears to rest on the assertion that the plaintiffs did not specify what sorts of goods they claim the "Constitution mandates be allowed to travel in municipal waste vehicles, and under what circumstances." Appellees' Br. at 43. "In sum, Plaintiffs have asked the Court for a broad advisory opinion that they (or more precisely, the trucking companies with whom they do business) can haul in trash trucks a broad range of goods, the specifics of which the Court can only guess." *Id.* However, as will become clear in our discussion, the legal issue presented "is one the resolution of which would be essentially unaffected by further factual development." *Peick v. Pension Benefits Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). The case presents "a substantial controversy between parties having adverse interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. at 506.

The ripeness for facial review of the surety bond provision and the disposal fees is a closer question. The implementing regulations have not yet been written or adopted. However, as the Supreme Court stated in *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission*, 461 U.S. 190, 201 (1983), "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief." In order to protect against a feared future event, "the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Sal-*

vation Army v. Department of Community Affairs, 919 F.2d 183, 192 (3d Cir. 1990) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460 (1974)). When "present harms will flow from the threat of future actions," *Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992), those present harms may mean a controversy is ripe for review. *See Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 63-64 (2d Cir. 1988) ("the prospect or fear of future events may have a real impact on present affairs, such that a preemptive challenge is ripe").

The district court found, based on defendants' own affidavits, that Indiana intends to enforce the surety bond provision and disposal fee provision once enabling rules are promulgated, and that enforcement would affect the plaintiffs' businesses. And, according to the plaintiffs, these statutes, though not yet enforced, have an immediate damaging effect on their businesses. As Judge Tinder recognized in the earlier case between the parties, "advance planning required for the interstate shipment of solid waste could well be impaired by the fear of increased future costs." *Government Suppliers Consol. Serv., Inc. v. Bayh*, 734 F. Supp. 853, 861 (S.D. Ind. 1990). Moreover, faced with future enforcement of provisions which, as the district court recognized, might eliminate disposal of out-of-state waste in Indiana, the appellants "are now incurring increased costs and diminution of revenues and profits based upon the need to secure and use disposal sites outside of the State of Indiana." Appellants' Combined Reply Br./Answering Br. at 12. In some cases, the absence of implementing regulations may render the actual effect of the statute too uncertain to make review possible. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."); *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 438 (1977) ("For [the Court] to review regulations not yet promulgated, the final form of which has been only hinted at, would be wholly novel."). In the

present case, however, what the statutes authorize is clear; only procedures and amounts are uncertain. There is no need to wait for regulations or specific applications to evaluate and make a conclusive determination as to the legal issue presented. *See Pacific Gas & Elec. Co.*, 461 U.S. at 201; *Armstrong World Indus.*, 961 F.2d at 412. The provisions are ripe for review.

III

ANALYSIS

The Commerce Clause not only gives the Congress the power to regulate, through the use of its legislative power, commerce among the states, but also limits the power of the states, even in the absence of federal legislation, to burden interstate commerce. *See Cooley v. Board of Wardens*, 12 How. 299 (1851). In *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978), Justice Stewart, writing for the Court summarized this latter aspect of the Commerce Power and the need for "delicate adjustment of the conflicting state and federal claims"[7]:

> Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity." *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185. In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440. The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect

[7] *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 553 (1949) (Black, J., dissenting).

to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion for the Court in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-538:

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. [511], 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' "

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.

The jurisprudence of this "dormant" or "negative" Commerce Power described by Justice Stewart is the product of the inevitable tension between the need to preserve the capacity of the country to address national economic concerns and the need of state government to exercise its residual police powers for the betterment and protection of its citizens. It should not be surprising, therefore, that litigation in this area often centers on areas of acute economic and social concern where the interests of preserving the national capacity to act and of allowing state government to solve local problems is particularly urgent. Consequently, in these last decades of the twentieth century, environmental problems have produced heightened concerns about waste management, and garbage has become a frequent focal point of dormant commerce power jurisprudence.

Garbage is, under the prevailing case law of the Supreme Court, indisputably an article of commerce, and " 'States are not free from constitutional scrutiny when they restrict' " its interstate movement. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S. Ct. 2019, 2023 n.3 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. at 622-23). States faced with increased and rising waste volumes and foreseeable shortages of landfill space have attempted by various statutory means to slow down or halt the inflow of waste from other states where disposal costs are higher. In *Philadelphia v. New Jersey*, 437 U.S. 617, the Supreme Court struck down a New Jersey law that, with a few minor exceptions, prohibited the importation of "solid or liquid waste which originated or was collected outside the territorial limits of the state."[8] More recently, in *Fort Gratiot*, 112 S. Ct. 2019, and *Chemical Waste Management, Inc. v. Hunt*, 112 U.S. 2009 (1992), the Court struck down Michigan and Alabama laws that discriminated against interstate commerce in trash. In these cases, the Court reaffirmed the basic principle behind *Philadelphia v. New Jersey*: one state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. at 628; *see Chemical Waste*, 112 S. Ct. at 2012; *Fort Gratiot*, 112 S. Ct. at 2024.

A. *The Backhaul Ban, Registration, and Stickering*

The heart of the Indiana regulatory scheme under review is the so-called backhaul ban and its attendant registration and stickering provisions. Our evaluation of these provisions requires that we set forth in more detail the principles developed by the Supreme Court to guide dor-

[8] Of course, the Commerce Clause also protects against a state's discriminatory attempt to restrict the outflow of trash. *See Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 780 (D.R.I.), *aff'd*, 947 F.2d 1004 (1991).

mant Commerce Clause analysis. As the Court explicitly noted in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986), there are two alternate analytical perspectives for problems under the dormant Commerce Clause. The "critical consideration" in determining the appropriate analysis "is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers*, 476 U.S. at 579.

Under the first test, a statute "which clearly discriminates against interstate commerce is unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " *Fort Gratiot*, 112 S. Ct. at 2023-24 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)). By contrast, under the second test (the *Pike* test), if a statute is neutral on its face, has only indirect or incidental effects on interstate commerce, and regulates evenhandedly, the statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* test, if a legitimate local purpose is "credibly advanced," *Chemical Waste*, 112 S. Ct. at 2014 n.5 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 624), "then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

The district court applied the lesser level of scrutiny enunciated in *Pike*. It reasoned that the statutes under review were "facially neutral," that they "treat[ ] similarly situated waste haulers alike, regardless of their residence or the origin of the wastes they carry. Neither intrastate nor interstate waste haulers may crosshaul municipal waste and any non-exempt item." Order at 25. The district court rejected the plaintiffs' argument that the backhaul ban was discriminatory because it affected primarily interstate haulers of waste (Indiana-generated waste generally is not crosshauled, but usually shipped intrastate in traditional,

dedicated garbage trucks). In the district court's view, the plaintiffs' argument boiled down to an assertion that the statute would apply most often to out-of-state entities, and that circumstance alone did not render the statute discriminatory. Order at 25 (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *see Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989)).

However, a determination that a statute does not discriminate on its face and "purports to regulate evenhandedly" does not end the question of which scrutiny should apply. *See Brimmer v. Rebman*, 138 U.S. 78 (1891). When a statute discriminates "in practical effect" against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it. In *Brimmer*, the Court struck down a Virginia statute requiring that fresh meat brought from more than 100 miles away from the place of sale had to be inspected and imposing a significant inspection fee on the seller of the meat. Recently, in *Fort Gratiot*, the Supreme Court set forth approvingly the *Brimmer* Court's analysis:

> This statute [cannot] be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota v. Barber*, [136 U.S. 313 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497. *If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced.*

Brimmer v. Rebman, 138 U.S. 78, [83] (1891) (as quoted by *Fort Gratiot*, 112 S. Ct. at 2025) (emphasis added); *see*

also Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

In the case before us, Indiana has not "artlessly disclosed an avowed purpose to discriminate," *Dean Milk*, 340 U.S. at 354, and therefore, to determine what level of scrutiny to apply, we must examine the practical effect of the statutes in question on interstate commerce. Indiana argues that the district court was correct in applying the *Pike* test—that the backhaul ban and its accompanying registration and stickering provisions are facially non-discriminatory, regulate evenhandedly, and have only incidental effects on interstate commerce.

As the Supreme Court has noted, the "critical consideration is the *overall* effect of the statute on both local and interstate activity," *Brown-Forman*, 473 U.S. at 573 (emphasis added), and whether the "effect is to favor in-state economic interests over out-of-state economic interests." *Id.* Furthermore, "when considering the purpose of a challenged statute, [the] Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The appellants characterize the statutes' effects on interstate commerce as incidental; in fact, the "circumstances of enactment suggest that it was the principal objective" of the statutes to impede importation of trash. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39 (1980). Nonetheless, we need not ascribe a motive of economic protection to the Indiana legislature in order to determine that the statute is discriminatory. The "evils of economic protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. at 626. In this regard, we cannot agree with Indiana's characterization of the effects of the statutes as merely incidental. The practical impact of the backhaul ban would be to reduce very significantly the inflow of out-of-state waste by raising the cost of disposing of such waste in

Indiana: the district court found that the fee paid to a trucker to haul waste doubles if a dedicated fleet is used. Discrimination may take the form of "raising the costs of doing business" for out-of-state entities, "while leaving those of their [in-state] counterparts unaffected." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977) (determining that a facially neutral statute was discriminatory). Because Indiana waste is usually transported in dedicated garbage trucks, intrastate transportation of waste remains unaffected. Like the North Carolina apple producers in *Hunt*, those engaged in intrastate waste disposal have not been forced to alter their business practices in order to comply with the statute, *see id.*, while those engaged in hauling out-of-state waste will have to change drastically their method of operation or give up hauling waste into Indiana altogether.

It is true, as the defendants point out, that the Commerce Clause does not "protect[ ] the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). However, in *Exxon*, the Court was dealing with a statute that "ha[d] no demonstrable effect whatsoever on the interstate flow of goods." *Id.* at 126. As the Court stated in *Exxon*, while some interstate refiners might "choose to withdraw entirely from the Maryland market," there was "no reason to assume that their share of the entire supply [of out-of-state gas sold in Maryland] will not be promptly replaced by other interstate refiners." Here, in contrast, with the raised cost for transport, Indiana has in effect erected an economic barrier against the importation of municipal waste. Indeed, as the district court found, if the backhaul ban is enforced, "a significant number of the remaining truckers now willing to haul trash to Indiana will become unwilling because they cannot afford to dedicate their trucks to so limited a range of payloads." Order at 16. Although waste undoubtedly will continue to be exported from New York, New Jersey, and Pennsylvania, it will be diverted from Indiana to states where disposal costs, unaffected by a backhaul ban or other protectionist legislation, will now be lower than in Indiana.

In short, because these provisions discriminate in practical effect against interstate commerce, they are subject to the higher level of scrutiny, and the appellees bear the burden of demonstrating that the provisions "further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives." *Fort Gratiot*, 112 S. Ct. at 2027.

Indiana claims that the backhaul ban serves substantial interests in public health and commercial reputation. It asserts that the ban on backhauling will prevent the risk of contamination of products which might result from being carried in trucks that have previously carried municipal waste. Although Indiana concedes that the evidence it presented at trial focused on possible contamination of foodstuffs (and its ban on transport of food in vehicles that have carried waste, codified at Ind. Code § 16-1-28-13.5, is not challenged here), it asserts that there is a danger to the public from contamination of other goods as well. In evaluating Indiana's asserted interest in protecting public health, we note first that Indiana produced the slightest of evidence before the district court that health risks are actually posed by the practice of crosshauling.[9] It did not demonstrate that such risks, if they do exist, could not be avoided by means less drastic than the outright ban on backhauling. Indeed, the district court did not find that less discriminatory alternative methods were not available. The district court wrote, "The plaintiffs argue that cleaning is effective and sufficient. Maybe the plaintiffs are correct." Order at 26. Secondly, the effectiveness of Indiana's backhaul ban in furthering the goals Indiana asserts is questionable at best: Trucks that have carried waste to neighboring states are not prevented from picking up goods in Indiana. *Cf. Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444-45 (1978) (not defer-

[9] In its brief, Indiana concedes that the record before the court discloses no confirmed cases of illness even from crosshauling food and garbage, much less garbage and other goods. Appellees' Br. at 32.

ring to state safety regulations that did not serve stated goals). Thirdly, we note that Indiana is not acting to protect its own citizens' health by this ban. *Cf. CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93 (1987) ("Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*."); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) ("State has no legitimate interest in protecting nonresident shareholders"). The goods that are crosshauled with garbage are goods destined for consumption in the eastern United States, not in Indiana.[10] This does not mean that Indiana has no interest in preventing contamination of such goods, but it does change the nature of Indiana's interest. The primary interest that Indiana is advancing is its interest in protecting the commercial reputation of goods manufactured in Indiana: this reputation will be tarnished if Indiana goods, contaminated during shipment, adversely affect the health of their users. Indiana's interest in the commercial reputation of Indiana goods is a legitimate local interest. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). However, given the little evidence Indiana provided concerning health risks posed by backhauling, we must conclude that Indiana has failed to carry its burden of demonstrating that there is a realistic possibility that Indiana goods will actually be contaminated and that contamination will adversely affect their reputation.

However, Indiana also asserts another aspect of its interest in its commercial reputation. It argues that, whether or not backhauling actually poses health risks, the reputation of Indiana goods is tarnished because of the public's distaste, rational or irrational, for the practice. It argues that the backhaul ban is thus necessary to protect the reputation of its goods, even if there is no health risk

[10] Although apparently Indiana garbage occasionally (though rarely) is carried in "dry vans" to Indiana landfills, the appellees do not direct our attention to any evidence in the record that these trucks (or any other trucks affected by the statute) then transport consumer goods destined for purchase and use by Indiana citizens.

whatsoever. Such an interest, an interest in catering to consumer preferences, is hardly deserving of the same deference that would be owed to significant health and safety concerns. Moreover, even if we assume the legitimacy of this state interest, before the district court Indiana argued that "any shortage of trucks willing to haul trash to Indiana [was] due to pressure that shippers put on truckers not to crosshaul waste, and not on [sic] its statutory restrictions." Order at 16. The district court noted that "the evidence indicates that several trucking companies have semi-voluntarily discontinued their waste hauling activities because shippers told them to." *Id.* Thus it appears that market forces alone will operate adequately to protect Indiana's interests. In light of our conclusion that the backhaul ban, registration, and stickering provisions are actually discriminatory and in light of Indiana's failure to demonstrate the necessity of the measures and the absence of less discriminatory alternatives, the conclusion is inevitable that Indiana's backhaul ban and registration and stickering program are unconstitutional under the Commerce Clause. They are "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse in to [its] remaining landfill sites." *Philadelphia v. New Jersey*, 437 U.S. at 629.

B. *Registration and Stickering as Independent Regulatory Devices*

Indiana's registration and stickering provisions are part and parcel of its backhaul ban. Their primary purpose, as Indiana concedes, is to facilitate enforcement of the backhaul ban. To the extent they are linked to the backhaul ban, they fall with it. However, Indiana asserts that it has other interests furthered by the registration and stickering provisions. Namely, it submits that these provisions protect the customers of truckers from deception and misrepresentation concerning the use to which a truck previously has been put. A state's interest in preventing consumer fraud and deception is a legitimate one. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333,

353 (1977). And in Indiana's case, it is also a real one: trucking companies admittedly do not want to reveal to their customers that a truck has been used to haul waste. However, the sticker does not notify customers effectively whether a truck has carried waste; it notifies customers and the public that, at sometime in the past, perhaps many months before, the truck has carried waste *into Indiana*. A truck that dropped off waste in a neighboring state, even the day before, may pick up any goods in Indiana without a sticker. Thus, Indiana's backhaul ban is limited by the specific terms of the statute to trucks carrying waste to Indiana landfills and disposal facilities. The ban does not extend to trucks that drop off waste in other states.

Indiana stated at oral argument that there is difficulty in developing an enforceable and administrable system that can monitor what trucks have hauled and disposed of in other states, but it conceded that nothing in the record supported that contention. Moreover, we note that Indiana's statute regulating the transportation of food in trucks that have previously carried garbage is not by its terms limited to trucks that have carried garbage *to Indiana*. *See* Ind. Code § 16-1-28-13.5. Nevertheless, Indiana also asserts that the registration and stickering program will assist it in enforcing this unchallenged ban on cross-hauling food and garbage. However, because trucks that have carried waste to other states have no stickers, the utility of the registration and stickering provisions for this purpose is limited. In addition, trucks are prohibited from hauling food for only fourteen days after a garbage haul. *See* Ind. Code § 16-1-28-13.5. Because the sticker does not give the date of the last garbage haul, its utility is even further limited. Thus, Indiana's statute will not be effective in providing information on the truck's past haulage; it will merely divert the flow of waste from Indiana.

The registration fee in itself raises a financial barrier around the State. For Indiana garbage trucks, which, as the district court found, are dedicated garbage trucks engaging solely in the hauling of waste, the per-haul cost

of the registration fee will be small. For the truck that hauls garbage only occasionally, the per-haul cost of the registration fee will be many times the cost to a hauler of in-state waste. Indeed, the district court noted that for trucks that haul trash to Indiana only once a year, the $100 registration fee may be prohibitive. Order at 33. In practical effect, the registration fee is thus like the *discriminatory* taxes and license fees struck down by the Court in a series of cases culminating in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the Supreme Court struck down Pennsylvania "axle taxes," stating that "in practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Scheiner*, 483 U.S. at 286 (citing *Sprout v. City of South Bend*, 277 U.S. 163, 170 (1928) (striking down a "flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily")). The Court explained that the axle taxes, as unapportioned flat taxes, penalized some interstate commerce:

> Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc. v. Hardesty*, 467 U.S. [638], 644 [(1984)]. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Scheiner, 483 U.S. at 284. According to the *Scheiner* Court, its ruling and other recent Supreme Court cases "repeat[ed] a theme that recurred in an early series of decisions invalidating facially neutral taxes on nonresident solicitors,

or 'drummers,' seeking to engage in business within the taxing jurisdiction." *Id.* at 281 n.12. One such case, relied upon by *Scheiner*, is *Nippert v. City of Richmond*, 327 U.S. 416, 427-29 (1946). In *Nippert*, the Court struck down an annual licensing fee, imposed on in-state and out-of-state salespersons, because the license, which was required whether the "solicitor" engaged in regular business or in a single act of business, "inherently bore no relation to the volume of business done or of returns from it." *Nippert*, 327 U.S. at 427. Moreover, the licensing fee "impose[d] substantial excluding and discriminatory effects of its own": "the small operator particularly and more especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun." *Id.* at 429. If other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in municipal waste would be magnified.[11]

Indiana conceded in the district court that the statute was aimed at eliminating the practice of making impromptu

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[11] *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 285 (1987):

> Although the actual imposition of flat taxes by other jurisdictions is not necessary to sustain the Commerce Clause challenge to Pennsylvania's flat taxes under the 'internal consistency' test, the adoption of these flat taxes by other jurisdictions even before the Pennsylvania suits were resolved surely suggests that acquiescence in these flat taxes would occasion manifold threats to the national free trade area. . . . Such taxes can obviously divide and disrupt the market for interstate transportation services.

As *Scheiner* notes, flat-rate license taxes, " 'if adopted by many cities and states, bear much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical (and in particular, with the same total quantity of sales) that sells in only one place.' " *Id.* at n.20 (quoting Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986)).

contracts to haul trash, Order at 33, but argues, as it also argued concerning the backhaul ban, that the registration provisions merely affect the plaintiffs' methods of operation, and that the Commerce Clause does not protect a business's methods of operation or market structure. However, again we are forced to conclude that *Washington Apple*, not *Exxon*, is the controlling precedent here. *Cf. Nippert*, 327 U.S. at 429 (striking down license fee which "the small operator particularly and more especially the casual or occasional one from out of the State will find . . . not only burdensome but prohibitive"). Many of the larger trucking companies have already voluntarily discontinued the practice of backhauling municipal waste. The registration and stickering provisions, with their prohibitive effect on the smaller or casual operator, will effectively block the remaining avenues for the importation of waste.

C. *Tipping Fees and Surety Bond*

1. Tipping fees

As we noted above in our description of Indiana's statutes, Indiana Code § 13-9.5-5-1 provides for a per-ton fee on municipal waste disposed of in Indiana facilities. It also provides for an additional fee for waste originating outside of Indiana. This additional fee is challenged by appellants as unconstitutional on its face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

"[A] state tax which burdens interstate commerce is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way."[12] *Maryland v. Louisiana*, 451 U.S. 725,

[12] Although a similar fee was at issue in *Chemical Waste Management*, the constitutionality of that fee hinged on the state's ad-

(Footnote continued on following page)

754 (1981). "The State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Id.* "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Id.* at 756. "The concept of a compensatory tax first requires identification of the burden for which the State is attempt-

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[12] *continued*
mitted purpose (to slow the volume of waste coming into its Emelle facility); because the fee would act to reduce only the volume of out-of-state waste, rather than curtail volume from all sources, the fee was impermissible. *See Chemical Waste*, 112 S. Ct. at 2015. In *Chemical Waste*, the Court did not consider the argument made here by Indiana, noting that Alabama

> presents no argument here, as it did below, that the additional fee makes out-of-state generators pay their "fair share" of the costs of Alabama waste disposal facilities, or that the additional fee is justified as a 'compensatory tax.' The Trial Court rejected these arguments, finding that the former was foreclosed by *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 287-289, and the latter to be factually unsupported by a requisite "substantially equivalent" tax imposed solely on in-state waste, as required by, e.g., *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S 232, 242-44. . . .

Id. at 2016 n.9.

Chief Justice Rehnquist approved logic like Indiana's in his dissent. *See Chemical Waste*, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting) ("Alabama's general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure the Emelle facility's safe operation. Thus, Alabamans will be made to pay twice, once through general taxation and a second time through a specific disposal fee."). Justice White, however, in the majority opinion in *Chemical Waste*, suggested that a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama would be a nondiscriminatory alternative to differential fees. *See Chemical Waste*, 112 S. Ct. at 2015.

ing to compensate." *Id.* at 759. In the present case, Indiana argues that its statute authorizing additional tipping fees for out-of-state waste is justified because it "merely offsets what would otherwise be a subsidy for interstate commerce" and "requires out-of-state haulers to shoulder their fair share of in-state administrative costs." Appellees' Br. at 70. According to Indiana, the "statute simply authorizes the Solid Waste Management Board to adopt rules imposing fees on trash generated outside Indiana in an amount 'necessary to offset' governmental costs attributed to the importation of such waste." Indiana argues that "at present, the State and local governments, and thus Indiana taxpayers, bear the cost of regulating solid waste disposal and long-term clean-ups in Indiana." Appellees' Br. at 70. It argues that "once this additional burden to the State is identified (as it will be in rulemaking), the State is 'constitutionally permitted to level the playing field.' " *Id.* We note that Indiana makes no argument that municipal waste and the risks it presents vary with its origin. Such an argument, if factually supported, might justify a higher fee for out-of-state waste. *See Chemical Waste*, 112 S. Ct. at 2014-15; *Fort Gratiot*, 112 S. Ct. at 2027 ("[O]ur conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste."); *National Solid Waste Management Ass'n v. Voinovich*, 959 F.2d 590, 593-94 (6th Cir. 1992) (vacating summary judgment and remanding to give Ohio opportunity to prove that out-of-state waste contained higher percentage of hazardous waste and that therefore higher fee was justified). In short, while Indiana wishes to use general public revenues to support Indiana users of landfills, it intends to impose a user fee on interstate users.

The problem with Indiana's argument is that it would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds. We find no support in the

caselaw for such a result.[13] As the Court noted in *Maryland v. Louisiana*, 451 U.S. at 759, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). "Equal treatment for in-state and out-of-state taxpayers similarly situated" has been a condition precedent for a valid tax. *Halliburton Oil*, 373 U.S. at 70. There is no such equality here: the Indiana statute imposes a tax on haulers of waste who cross the state line, while sparing haulers of waste who remain entirely within the state.[14] *See Tyler*

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[13] *Cf.* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1120 n.59 (1986) (discussing "revenue-tariffs"):

> Will someone object that the revenue is not raised at foreign expense because the tariff is paid by local actors such as importers and ultimately paid by the local consumer? This overlooks the fact that in the final analysis the burden is almost certainly shared by all parties, including producers. And the point of the discriminatory aspect of the tariff is to see that insofar as the burden of the tariff is borne by producers, it is borne by foreign producers and not by local. The only way to de-emphasize this purpose to externalize a part of the revenue burden is to de-emphasize the revenue aspect of the tariff entirely. But then the point of the tariff must be to shift business from foreign producers to local. In short, we are looking once again at a classical protectionist tariff.

But see Chemical Waste, 112 S. Ct. at 2018 (Rehnquist, C.J., dissenting) ("Alabama's general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure the Emelle facility's safe operation. Thus, Alabamans will be made to pay twice, once through general taxation and a second time through a specific disposal fee.").

[14] We do not deal here, of course, with a situation where the state itself has chosen to operate in the marketplace and, in that capacity, to subsidize its own residents. *See Reeves v. Stake*, 447 U.S. 429 (1980).

Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 244-45 (1986).

Moreover, as the appellants point out, the statute not only allows the state to impose an additional tipping fee on out-of-state waste, it provides for additional fees to offset costs incurred by "a county, municipality or township that can be attributed to the importation of the solid waste into Indiana." Ind. Code § 13-9.5-5-1(b). However, these subdivisions of the state may not impose the additional fee on in-state waste originating outside the subdivision, even though the same costs are presumably incurred and not paid by the Indiana citizens to whom they are attributable. This favoring of in-state interests is no more permissible when carried out by a subdivision of the state than when carried out by the state itself. *See Fort Gratiot*, 112 S. Ct. at 2024 ("[A] State may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."). We see no possibility for the defect to be corrected by regulations to be adopted to implement the statute. The provision is unconstitutional.

2. Surety bond

As noted above, the district court ruled that Indiana's surety bond provision violated the Commerce Clause. Indiana challenges that ruling in its cross-appeal. Like the disposal fee provision, the surety bond requirement is discriminatory on its face: only out-of-state operators are required to post bond. Therefore, the surety bond is subject to the higher level of scrutiny applied to facially discriminatory statutes, and "is unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " *Fort Gratiot*, 112 S. Ct. at 2023-24 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)). Indiana argues that the surety bond provision is necessary to "facilitate the collection of fines and penalties from nonresidents." Ap-

pellees' Br. at 72. It asks the court to take judicial notice of the fact that "it costs more to collect a judgment from a nonresident" and that "such costs are unique to nonresidents." *Id.*

We fail to see any justification for taking judicial notice. Indiana has made no showing that problems in collecting penalties and fines from nonresidents are in fact greater than in collecting from residents. More fundamentally, Indiana has made no showing whatsoever that nondiscriminatory alternatives are not available. Moreover, Indiana's surety bond will erect a barrier to the importation of out-of-state waste as surely as will its registration fee. The district court found that many of the smaller operators, who remain willing to haul trash into Indiana, would find the registration fee prohibitive. For these operators, the surety bond would clearly be prohibitive as well. Moreover, because the surety bond is imposed merely on the basis of nonresidency of the operator, it will also erect a barrier against nonresidents who wish to engage in intrastate waste disposal. Such a barrier, unless justified by a substantial reason for differentiating between residents and nonresidents, would be forbidden under the Privileges and Immunities Clause. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). Indiana's surety bond provision imposes a discriminatory burden on interstate commerce and is unconstitutional under the Commerce Clause.

D. *The Pike Test*

We have determined that Indiana's statutes do not survive the elevated scrutiny given to legislation that unambiguously discriminates against interstate commerce. So weak is the rationale offered by Indiana, that even when the statutes are examined under the *Pike* test, the same result is reached. As we noted above, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), if a statute is neutral on its face, has only indirect or incidental effects on inter-

state commerce, and regulates evenhandedly, the statute will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." If a legitimate goal is "credibly advanced," *Chemical Waste*, 112 S. Ct. at 2014 n.5, "then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Although *Pike* sometimes is understood to authorize a "general-purpose balancing," *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989), in fact the Court has taken a "decidedly confined view of the judicial role: 'We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation." ' " *Id.* (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring in judgment)). The Court has been particularly reluctant to pass on the wisdom of legislation touching upon health and safety. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion). Nonetheless, the "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Id.* (citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978)). In the present case, Indiana has asserted its interest in health, commercial reputation, and preventing consumer deception. As we noted above, Indiana's asserted health concerns are actually an interest in its commercial reputation; and, in serving its interest in its commercial reputation, Indiana is bowing to unreasoned public opinion. Moreover, as we noted, because trucks that have carried waste to any neighboring state may pick up Indiana goods and carry them out of state, Indiana's statutes will further their stated purposes only marginally.

Truckers could still deceive shippers and still haul Indiana goods in trucks that have carried garbage. A State's interest in its commercial reputation or in preventing consumer deception will not always outweigh the national interest in the free flow of commerce under the *Pike* test. *See Pike*, 397 U.S. at 146; *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 325, 336 (1925). The burden imposed on the free flow of commerce by the Indiana statutes is heavy—the district court found that, if enforced, the statutes at issue here would effectively bar the importation of out-of-state waste into Indiana. This burden is clearly excessive in relation to the putative local benefits of the statutes. Indiana's statutes must fall even under the *Pike* test.

Conclusion

For the foregoing reasons, that portion of the judgment of the district court finding constitutional Indiana's backhaul ban, registration and stickering requirements, and disposal fees is reversed. The district court's judgment finding Indiana's surety bond provision unconstitutional is affirmed. The appellants-cross appellees may recover their costs in this court.

AFFIRMED IN PART AND
REVERSED IN PART

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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OPINION OF THE DISTRICT COURT:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,	)	
Plaintiffs,	)	
v.	)	NO. IP91-899C
THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION FOR A DECLARATORY JUDGMENT

This cause is before the Court on plaintiffs' motion for a declaratory judgment that various provisions of the Indiana Solid Waste Management Act (the "Act") violate the United States Constitution, specifically the Commerce Clause. This case involves either, as the defendants allege a constitutional attempt by Indiana to regulate the disposal of solid waste, or, as the plaintiffs, Government Suppliers Consolidating Services, Inc. ("Government Suppliers") and Jack Castenova, Inc. ("Castenova"), contend, an unconstitutional attempt to inhibit the free flow of commerce into

Indiana.[1] Plaintiffs, after describing the questioned statutes as "paradigmatical examples of parochial protectionism gone wild," ask the Court to permanently enjoin the state of Indiana from enforcing various provisions of the Act.[2]

Plaintiffs predict that the provisions in question will put them out of business, and they accordingly seek protection from the Court. Defendants, the Honorable Evan Bayh, Governor of the State of Indiana, and the Honorable Kathy Prosser, Commissioner of the Indiana Department of Environmental Management (collectively the "State"), counter, *inter alia*, that it is of no concern to Indiana if the plaintiffs can no longer make a profit and will go out of business, although they do not believe that to be the case. Defendants continue that Indiana's interest is in protecting its citizens from environmental dangers and ensuring the credibility and reputation of Indiana products. This matter has been fully briefed and ripe for final disposal since January 2, 1992.

I. Background

The controversy before the Court is about the disposal of municipal solid waste -- what most people think of as common, everyday trash. Simply put, the underlying difficulty of this litigation is that there are not enough disposal facilities to meet present demands in some regions of the United States. This Court is by no means the first, and will not be the last, to be confronted with determining the constitutionality of a state statute regulating the disposal of municipal waste. In 1978, the United States Supreme Court applied the dormant Commerce Clause to invalidate a New Jersey law that completely banned the importation of out-of-state waste. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Justice Stevens foreshadowed this litigation when he wrote:

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[1]The interstate movement of trash is commerce, and any regulation of its movement must pass constitutional muster under the dormant Commerce Clause. *City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).*

[2]As the Court has ruled on the merits, plaintiffs' renewed motion for preliminary injunction is moot and need not be addressed.

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and these States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from the efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Id. at 629. As foretold, New Jersey now seeks to send its waste outside of its boundaries.

The State of Indiana is in the unenviable position of being an economically favorable disposal site for municipal waste from other regions of the United States. Indiana has attempted on two occasions to address what it perceives as a problem. In December 1990, Judge John Daniel Tinder of this district found that three provisions of Indiana's first attempt at regulation regarding the hauling of waste into Indiana were unconstitutional under the dormant Commerce Clause. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990) [thereinafter *Government Suppliers I*)]. Subsequent to Judge Tinder's ruling, the Indiana legislature enacted several new provisions relating to the disposal of municipal waste. This Court must pass on the constitutionality of the challenged new provisions.

After this brief background section and a section on procedural history, the order is organized into a single Discussion section rather than the typical Findings of Fact and Conclusions of Law sections. Hopefully, by including the relevant facts, as determined by this Court, concomitantly with the legal analysis, the Court can reduce duplicity and increase clarity.

II. Procedural History

On August 9, 1991, the plaintiffs filed their complaint for declaratory judgment and a motion for preliminary injunction. The

Court reviewed the extensive briefs relating to the motion for preliminary injunction and heard oral argument. On October 2, 1991, the Court denied plaintiffs' motion for preliminary injunction in total. The Court then heard oral argument limited to the facial constitutionality of the transfer-station inspection provisions, surety bond provisions, and the disposal fee provisions, on October 8, 1991. The Court conducted an evidentiary hearing on November 7, 8, 12-14, 1991, concerning the constitutionality of the backhauling prohibition and the vehicle registration/stickering program. All post trial briefing ordered by the Court was completed on January 2, 1992. Even though "haste makes waste," the Court has attempted to reach a timely resolution of this matter.

III. Discussion

This cause concerns House Enrolled Act ("HEA") 1716. The provisions of HEA 1716 were codified in Title 13 of the Indiana Code. The plaintiffs seek a declaratory judgment that nine provisions of HEA 1716 are unconstitutional under the Commerce Clause of the United States Constitution and ask that the State be permanently enjoined for enforcing these provisions. The challenged portions of the revised Act are summarized as follows:

1. The alleged re-enactment of the hauler and health-officer certification provisions previously found unconstitutional;

2. The alleged statutory restriction of a federal remedy that allows for the recovery of attorneys' fees;

3. Transfer station inspection provisions;

4. Surety bond provisions;

5. Service of process provisions;

6. Disposal fee provisions;

7. Local district powers to bar out-of-state generated waste;

8. Vehicle registration/stickering provisions; and the

9. Backhauling prohibition.

By order dated October 2, 1991, this Court held that it does not have jurisdiction to address the health officer and hauler certification provisions (item 1 above). Additionally, the Court held that the service of process provision (item 5 above) and the provision that allows local districts to bar waste (item 7 above) were not ripe for review. Moreover, the Court dismissed with prejudice defendants' claim that HEA 1716 unconstitutionally restricted the federal remedy that allows for the recovery of attorneys' fees (item 2 above).

Also on October 2, 1991, this Court held that the establishment of a transfer station inspection program (item 3 above), the surety bond provisions (item 4 above), and the disposal fee provisions were ripe for facial review (item 6 above). Finally, the Court found that the vehicle registration/stickering provisions (item 8 above); and the backhauling prohibition (item 9 above) were ripe for review as applied. This order disposes of the challenges to the provisions reviewed on their face along with those reviewed as applied.

To understand the significance of the challenged provisions and the positions taken by the parties, it is necessary to have a thorough knowledge of how the waste hauling industry presently operates, particularly the long-haul solid waste business, and how the provisions in question would alter the way in which the industry operates. But first, the Court must address some evidentiary disputes. At the evidentiary hearing concerning the backhauling prohibition and the vehicle registration/stickering provision, the Court took the admissibility of several exhibits under advisement.

A. Evidentiary Rulings

The defendants have offered as evidence a report of hearings before a United States House of Representatives subcommittee considering proposed federal backhauling legislation ("Exhibit S"). Defendants say the congressional report is admissible because:

1. The hearing report contains information directly relevant to the benefits and burdens of the Indiana backhauling law. The report deals with proposed federal legislation on the same subject, and its relevance is clear.

2. Under applicable constitutional standards, it does not matter whether Indiana policymakers actually read the hearing report in considering HEA 1716. The Indiana law may be upheld on the basis of any information a reasonable legislator *could have* relied upon.

3. The hearing report is admissible as an official record under Fed. R. Evid. 803(8) (A), to show the activities of Congress on legislation addressing the same issue that is before this Court.

4. The hearing report is the type of information the courts frequently consider, in the tradition of the "Brandeis brief," in evaluating constitutional challenges to laws. An example squarely on point is *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924), where Justices Brandeis and Holmes relied in their dissent in part on congressional hearings on proposed federal legislation on the same subject as the State law at issue. 264 U.S. at 521 n.4, 525-26 & nn.18-19. The preferred practice in such cases is to put the material in the trial record, as defendants seek to do here.

It is not disputed that the congressional report contains relevant evidence. Moreover, it is undisputed that the State, in supporting the backhauling provision, is not limited to evidence that was actually considered during the legislative process. However, the report does present a problem concerning its admissibility because the included testimony is relevant only if it is true.

Specifically, statements concerning the health risks involved in crosshauling are relevant only if true. If true, such information is directly relevant to the benefits and burdens of the Indiana backhauling law. However, the Court cannot examine the nexus between the benefits and burdens if the benefits are supported by untested testimony. The Court held an evidentiary hearing to

review and test the evidence. While the Court can examine evidence not considered by the state legislators, that evidence must be reliable. The statements concerning the health risks inherent in crosshauling that are contained in Exhibit S were not subject to cross-examination. Defendants point to no other indicia of reliability. Thus, statements concerning the health risks associated with crosshauling contained in Exhibit S are not admissible. Defendants have not offered into evidence portions of Exhibit S that are relevant regardless of the truth of the matter asserted. The Court will not attempt such a reduction of the several hundred page document because the excluded evidence is not outcome determinative. Exhibit S is not admitted into evidence.

Defendants have offered as Exhibit L an article entitled "The Nosocomial Colonization of T. Bear." Nosocomial infections are those that occur in the hospital environment. Very generally, the article concerned the transfer of bacteria through teddy bears in a controlled hospital environment. This case involves the cross-country transfer of garbage in trucks. How the article would aid the Court in its inquiry is not explained by the defendants. The article is simply not relevant and is, accordingly, not admissible.

Already before the Court is evidence that Columbia House and L.A. Gear do not want their products transported in trucks that have transported municipal waste. Moreover, the admitted evidence indicates that three trucking companies have received verbal instructions from their shippers not to haul their goods in garbage trucks. However, in addition to and consistent with the evidence already admitted, the defendants now offer letters from shippers instructing carriers not to haul the shippers' products in trash trucks. Although the parties have briefed the admissibility of these letters at length, the Court is struck by the total unimportance and lack of necessity of the offered exhibits. Federal Rule of Evidence 403 provides that evidence, "although relevant, . . . may be excluded if its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence." The exhibit is repetitive and will not be admitted into evidence.

The final group of exhibits which the defendants attempt to admit into evidence concern the arrest of an MAB truck driver. The

exhibits are offered to impeach the credibility of Jack Hodge, the patriarch of NAB trucking. Generally, a witness may not be impeached by extrinsic evidence of collateral matters elicited on cross-examination. *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990). A matter is collateral if the fact could not have been introduced for a purpose other than contradiction. *Id.* Extrinsic evidence of collateral matters is allowable if necessary to impeach a contradictory statement made on direct examination. *Id.* at 1376. Defendants support admissibility by citing *United States v. Garcia*, 900 F.2d 571, 575 (2d Cir. 1990), for the rule that "[w]here a witness has created a false impression on a particular matter, . . . extrinsic evidence can be used to impeach." However, a closer reading of *Garcia* reveals the holding to be that where a defendant *in his direct testimony* falsely states a specific fact, extrinsic evidence can be used to impeach during cross-examination. *Id.* The exhibits offered by the defendants in no way counter a fact offered by Hodge in his direct examination. Therefore, the exhibits are inadmissible.[3] Having disposed of the preliminary evidentiary matters, the Court now turns to the merits.

B. Overview of Industry

The long-haul waste disposal industry consists of several separate yet interrelated entities. The plaintiffs are brokers of municipal solid waste. Brokers act as a middle-person between transfer stations, where the solid waste is temporarily stored, and truckers, who transport the solid waste to the Midwest. The relationship of each entity is more easily understood if one traces solid waste through its journey from origination to final disposal.

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[3]Even if the exhibits were admitted into evidence, careful reading of the deposition transcript reveals that the exhibits do not impeach the credibility of Hodge. Hodge admitted personal knowledge that one of his trucks was alleged to have been involved in an accident. Hodge then stated that the newspaper account was not true and refused to elaborate. Hodge did not say that the newspaper article was totally false. Accordingly, the offered exhibits do not impeach the testimony of Hodge even if an MAB truck was involved in the accident.

The trash that the plaintiffs broker originates in New York, New Jersey and Pennsylvania. From initial curbside pick-up, the trash is taken, typically by a municipal waste collection truck, to a municipal transfer station or recycling center near the point of pick-up. At these centers, the solid waste is compacted into large bundles, bound, and set aside for transportation in a larger truck to a final disposal facility – i.e., a landfill. At this point, plaintiffs contact truckers who are looking for loads and arrange impromptu, or at least informally, for the trash to be taken to previously identified landfills in the Midwest. The trucker, without ever meeting the broker, picks up the trash at the transfer station and transports the trash to the prearranged landfill in Indiana. At least three different styles of trucks are used to transport the trash to Indiana: (1) ordinary box-type semi trailers (generally referred to as "dry vans"[4]); (2) open-top "dump trailers"; and (3) flatbed trailers.

At first glance, one might wonder how the brokers turn a profit. After all, the brokers arrange for the transportation of municipal waste from the eastern portion of the United States to Indiana -- a distance of several hundred miles. However, landfill space is at a great premium in the East. The cost of dumping in an East Coast landfill accordingly is extremely high. For example, a Long Island facility charges $125.00 per ton to dump and an Indiana landfill charges only about $15.00 a ton. The transportation cost from the East Coast is approximately $35.00 a ton. Consequently, despite the cost of hauling the trash to Indiana, it still can be far less expensive to use an Indiana landfill rather than an East Coast facility. In fact, the process is very profitable.

The plaintiffs do not haul the trash themselves nor do they have any ownership interest in the trucks. The plaintiffs are able to complete the vast majority of their business over the telephone. An individual trucker may haul trash to Indiana only once in several years or may generally haul trash to the Midwest. The brokers do not use written contracts. Also, each load is transported on *ad hoc*, one-time basis.

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[4]Refrigerated versions of dry vans are known as "Reefers."

To keep costs down, the brokers utilize a concept known as "backhauling." A typical scenario is that a trucker has hauled a product, which could be anything from manufactured goods to watermelons, from the Midwest to New York, New Jersey, or Pennsylvania and must return to the Midwest for another load. As it would be inefficient and uneconomical for the truck to make the return journey empty[5] -- operating costs do not significantly change whether the truck is empty or fully loaded -- the broker arranges for the trucker to haul trash to the Midwest. The original product transported to the East to [*sic*] known as the "fronthaul," and the trash is termed the "backhaul." The distinction between the terms "fronthaul" and "backhaul" seems to be related to, the importance the driver puts on the load. A driver's main source of income is the "fronthaul." Because of the sequential nature of the terms "fronthaul" and "backhaul," the Court will sometimes use the term "crosshaul."

C. Jurisdiction

It is axiomatic that federal courts are courts of limited jurisdiction. The presumption in any case is that a federal court lacks jurisdiction, and accordingly this Court must be vigilant in policing its limited jurisdiction. *Matchett v. Wold*, 818 F.2d 574, 575 (7th Cir.), *cert. denied*, 484 U.S. 897 (1987). Article III, section 2 of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies." *City of Evanston v. Regional Transp. Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). The terms are interchangeable. Standing considerations are doctrinal subsets of the controversy jurisdictional limitation. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Unity Ventures v. Lake County*, 841 F.2d 770, 774 (7th Cir.)1 *cert. denied*, 488 U.S. 891 (1988). The overarching purpose of these doctrines is to ensure that a federal court addresses only substantial controversies between adverse parties such as to assure that the issues will be aggressively litigated. *Cf. Committee For a Sane Nuclear Policy/Indianapolis*

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[5] Running empty is known as "deadheading."

Chapter v. City of Indianapolis, 668 F. Supp. 1211, 1214 (S.D. Ind. 1987).

This Court must take special care to assure itself of jurisdiction when it reviews, on federal constitutional grounds, Indiana statutes that require administrative rulemaking for effectuation. As the United States Supreme Court explained:

> Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. . . . We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism.

Public Service Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952) (citation omitted). Even more telling, "in our federal system, it is preferable that constitutional attacks on state statutes be raised defensively in state-court proceedings rather than in proceedings initiated in federal court." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 639 n.8 (1985). However preferable a state-court defensive action would be in terms of the integrity of our federal system, this action was filed in federal court, and if this Court has jurisdiction, in federal court it must remain.

The defendants contend that plaintiffs lack standing to challenge either the backhauling prohibition or the vehicle registration/stickering provision because those laws regulate only the hauling of municipal waste for disposal in Indiana and the plaintiffs are not directly engaged in this business. Additionally, defendants opine that plaintiffs' challenge to the backhauling provision poses nothing more than a broad abstract issue on which an advisory opinion is sought.

Defendants first allege that this Court lacks standing to address either the backhauling provision or the vehicle registration/stickering provision. The standing inquiry involves two components: the requirements of Article III of the Constitution, and prudential concerns. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978). Article III requires the plaintiff to establish some injury personally suffered. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The three generally recognized prudential limitations are: (1) the policy against deciding generalized grievances, (2) the limitation on allowing a party to assert the rights of a third party, and (3) the requirement that the plaintiffs fall within the zone of interest which the statute was intended to protect. *Government Suppliers I*, 753 F. Supp. at 760.

Plaintiffs assert that the provisions in question will cause personal detriment because these laws will discourage truckers from hauling municipal waste to Indiana, their business relies heavily on shipping waste to Indiana, and therefore, the provisions will result in a great monetary loss. Specifically, plaintiffs allege that the challenged provisions will cost them millions of dollars. Defendants say that plaintiffs failed to support their claim of injury because neither plaintiff appeared at trial and because they have failed to prove that any shortage of trucks willing to haul waste to Indiana is the result of Indiana's statutes. Attendance at trial is not always indicative of import to a party. In addition, the deposition testimony of each plaintiff was accepted into evidence over the objection of the State.

Defendants assert any shortage of trucks willing to haul trash to Indiana is due to pressure that shippers put on truckers not to crosshaul waste, and not on the statutory restriction.[6] Certainly, the evidence indicates that several trucking companies have semi-voluntarily discontinued their waste hauling activities because shippers told them to. However, it is also clear that many truckers, especially small operators, are still willing to crosshaul trash. If the

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[6]The backhauling limitation is set out in detail starting on page 24 of this order.

questioned provisions are enforced, then a significant number of the remaining truckers now willing to haul trash to Indiana will become unwilling because they cannot afford to dedicate their trucks to so limited a range of payloads. Because such decisions will directly impact the plaintiffs, the plaintiffs have shown that these statutes will cause them injury.

Defendants next contend that even if the statutes will cause the plaintiffs injury, the Seventh Circuit has expressly held that this sort of injury will not confer standing under Article III. For this proposition, the defendants rely on the case of *Frank Rosenberg, Inc. v. Tazewell County*, 882 F.2d 1165, 1168-69 (7th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990). In *Rosenberg*, a prospective seller of land contracted with a prospective purchaser contingent on the approval of the prospective purchaser's permit to build an incinerator on the property. The county denied the permit, and the prospective seller sued the county. The Seventh Circuit affirmed the trial court's dismissal for lack of standing, holding that the injury caused by the county's refusal to issue the permit was not sufficient to confer standing under Article III. *Rosenberg*, 882 F.2d at 1168-69. It is noteworthy that the seller did not join in the permit application and the county's action did not deprive the seller of alternative land uses or an entire class of potential buyers. The seller's lone contractual expectation was that the buyer would purchase the land if the efforts to secure the permit were successful. *Id.* Unlike *Rosenberg*, where the plaintiff did not allege a continuing impact on its ability to sell the property, the brokers' business in this case will be substantially and continually impacted by the loss of an entire class of potential truckers. *Id.* at 1170. Thus, the plaintiffs have met the Article III requirement of "injury in fact."

In a similar vein to the Article III injury in fact requirement, the defendants argue that the plaintiffs lack standing because they are not entitled to assert the rights of the truckers. The general prohibition against raising the rights of a third party (also called *jus tertii*) stems from prudential, or non-constitutional, concerns. The Supreme Court has noted that "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *South Carolina v. Regan*, 465 U.S. 367, 380

(1984). Defendants claim this case does not warrant an exception to the general rule against *jus tertii*.

The rule against *jus tertii* is set aside where the rights would go unvindicated absent the intervention of a third party. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Judge Tinder in *Government Suppliers I*, determined that trash brokers are entitled to advocate the rights of waste generators, waste haulers and landfill operators because these parties could not, as a practical matter, assert their own rights. *Government Suppliers I*, 753 F. Supp. at 761-62. While not challenging the correctness of Judge Tinder's determination, defendants maintain that the plaintiffs have shown no obstacle whatsoever to the trucking companies' assertion of their own claims. Defendants attempt to contrast this case with *Government Suppliers I*, claiming that the evidence before Judge Tinder indicated that truckers only hauled trash occasionally, whereas the evidence before this Court shows that many trucking companies repeatedly haul municipal waste. However, the evidence before this Court also indicates that small operators continue to haul trash only occasionally, and that trucking firms are not anxious to admit publicly that they crosshaul trash. As Judge Tinder held, "all [other] potential litigants would be likely to give pause before willingly assuming the notoriety and discovery involved." *Government Suppliers I*, 753 F. Supp. at 762. Thus, the trucking firms that generate sufficient revenue to finance a dormant Commerce Clause action against a state government would not likely bring the action so as to remain out of the public eye. Accordingly, the rule against *jus tertii* does not bar the plaintiffs from challenging the provisions in question.

Defendants' last jurisdictional argument is that plaintiffs' claim regarding application of the backhauling prohibition is not justiciable because it constitutes a general grievance which the Court should not decide. To illustrate the breadth of the issue before the Court, the defendants pose two subsidiary questions: "whether the statute is constitutional as applied to a shipment of hermetically sealed electronic components in a vehicle that has been cleaned with the best available technology after hauling garbage, months after the garbage haul, [and] . . . whether the statute is constitutional as applied to a shipment of unpackaged fresh produce

in a vehicle that has been cleaned only perfunctorily or not at all after hauling garbage only hours before."

Certainly, the concerns in each hypothetical are different, at least in magnitude. However, as discussed below, the differences in the two situations do not go to all justifications for the backhauling provision. The statute is allegedly justified because of the effect of crosshauling on the reputation of Indiana products, not solely due to possible health risks. Thus, the fact that the plaintiffs have not been specific as to the product crosshauled is not vital to the Court's inquiry, and accordingly, does not make the controversy ill-defined. For all the above reasons, the plaintiffs have standing to pursue their constitutional claims before this Court.

D. Commerce Clause Analysis

The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. On its face, this clause of the Constitution seems nothing more than a grant of power to Congress. However, for more than 100 years the United States Supreme Court has held that the Commerce Clause also includes a prohibition on states from taking certain actions even absent congressional action. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). This prohibition is known as the "dormant" Commerce Clause. While the Commerce Clause is silent as to how much power a state retains to regulate economic activities within its borders, it is well-settled that the implied prohibition of the dormant Commerce Clause limits a state's power to erect barriers against interstate commerce. Stated another way, one state cannot isolate itself in the stream of interstate commerce from a problem shared by all states. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978). However, a state has every right, and even a duty, to protect its reputation, environment and the health of its citizens. The tension between these two concepts is at the heart of this controversy.

Analysis of each provision of the statute in question begins with the basic proposition that a statute is presumed to be constitutional. *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988)

(reviewing federal statute); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979); *cf. Eddy v. McGinnis*, 523 N.E. 2d 737 (Ind. 1988) (every enactment by the state legislature that is challenged before the Indiana Supreme Court is presumed to be constitutional). Without doubt, the interstate movement of trash is commerce, and any regulation of its movement must pass constitutional muster under the dormant Commerce Clause. *City of Philadelphia*, 437 U.S. at 629.

1. Standards of Review

A state statute challenged as a violation of the dormant Commerce Clause is subject to one of two standards of review depending on the discriminatory nature of the regulation. If a statute is discriminatory on its face or in practical effect, the state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this purpose; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). This standard is generally referred to as the "elevated scrutiny test."

If a statute is neutral on its face and its effects on interstate commerce are only incidental, the statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This test is generally referred to as the "*Pike* test." The plaintiff has the burden of proving the unconstitutionality of the statute under the *Pike* test. Even under the *Pike* test, a statute will not be held unconstitutional unless the burden imposed on commerce is clearly excessive in relation to the local benefits. *Pike*, 397 U.S. at 142. Though general-purpose, legislative-type balancing is not permitted, the Court can look for discrimination. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505-06 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989).

Under the elevated scrutiny test a statute is almost always found to be unconstitutional because of the difficulty in meeting the

burden of proof. Conversely, under the *Pike* test a statute is generally determined to be constitutional. Therefore, it is obvious that a crucial decision in dormant Commerce Clause litigation is which test is applicable. There is no clear line separating the categories of state regulation. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). "[T]he critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* The correct test to be applied to the provisions at issue will be determined as each section is considered.[7]

In evaluating the particular provisions, it is important to remember that the Court is evaluating the law as enacted. It is immaterial what Governor Bayh or Commissioner Prosser would like the law to do. The issue for the Court is what the law does. The plaintiffs invite the Court to speculate that both Governor Bayh and Commissioner Prosser would politically gain from a complete ban on the importation of out-of-state trash. Plaintiffs have presented numerous statements of the Bayh Administration which indicate that it would prefer for Indiana not to be the "dumping ground" for the nation. However, these allegations of electioneering are of no moment when interpretation of the dormant Commerce Clause of the Constitution is at issue. *Government Suppliers I*, 753 F. Supp. at 769. The practical impact of the law is to require the use of semi-dedicated fleets of trucks to haul garbage in Indiana, with a limited crosshaul of construction materials. The constitutionality of the provisions rest solely on their effect on interstate commerce.

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[7]Previously in *plaintiffs' Response to Surreply of Defendant Governor Bayh in Opposition to Plaintiffs' Motion for Preliminary Injunction* at 8, the plaintiffs did not dispute that the *Pike* test applied to the backhauling provision; and in their *Brief in Support of Plaintiffs' Motions for a Temporary Restraining Order and Preliminary Injunction at 17*, the plaintiffs applied the *Pike* test to the vehicle registration/stickering provision. Conversely, in their *Reply Brief in Support of Plaintiffs' Motion for Preliminary Relief* at 6, plaintiffs argued for application of elevated scrutiny to backhauling provision. Now, after the evidentiary hearing, the plaintiffs argue that elevated scrutiny applies to both provisions.

2. Backhauling Prohibition

In 1990, the Indiana General Assembly enacted Indiana Code § 16-1-28-13.5, which restricted backhauling. This section stated that "a truck that is used to transport a quantity of more than four thousand (4,000) pounds of solid waste landfill. . . may not be used to transport food until at least fifteen (15) days after transporting solid waste." Ind. Code § 16-1-28-13.5(d). Additionally, "[a] truck that is used to transport a quantity of more than four thousand pounds of solid waste to a landfill . . . may be used to transport food less than fifteen (15) days after transporting the solid waste if the truck, after transporting the solid waste, has been properly sanitized according to rules adopted [by the state board of health]." Ind. Code § 16-1-28-13.5(e). The plaintiffs have not challenged these provisions.

In 1991, the Indiana General Assembly enacted an even greater restriction on backhauling. The 1991 provisions state that a municipal waste collection and transportation vehicle may be used to collect and transport only municipal waste and wood, concrete, brick, dirt, sand, gravel, asphalt, salt, coal, gypsum, slag, scrap metal, and other bulk industrial and construction materials. Ind. Code § 13-7-31-13.1. Accordingly, a truck that has transported trash to Indiana can pick up in Indiana only the listed items.

a. Standard of Review

Generally, elevated scrutiny applies only to statutes that discriminate facially or practically against interstate commerce. *CTS Corp.*, 481 U.S. at 87. While "discrimination" is a difficult term to define, the Supreme Court looks to whether the provision "visits its effects equally upon both interstate and local business." *Id.*, (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980)). Moreover, a statute is not discriminatory even though in application it will apply most often to out-of-state entities. *CTS Corp.*, 481 U.S. at 88.

The backhauling ban is a facially neutral statute. It treats similarly situated waste haulers alike, regardless of their residence or the origin of the wastes they carry. Neither intrastate nor

interstate waste haulers may crosshaul municipal waste and any non-exempt item. However, Indiana-generated municipal waste generally is not crosshauled -- that is, trash is usually shipped intrastate in traditional, dedicated garbage trucks, not dry vans. Thus, the plaintiffs argue that the effect of the statute is discriminatory. As noted above, a statute is not discriminatory if it will apply identically -- even though most often -- to out-of-state entities. Because nothing in the Indiana Act imposes a greater burden on out-of-state haulers than it does on similarly situated Indiana haulers, the backhauling ban does not discriminate against interstate commerce and the *Pike* test applies.[8]

b. Benefits to State

The defendants state that the backhauling ban will help ensure the public health by reducing the spread of disease. Under the previous statutory provision, cleaning was an alternative. *See* Ind. Code § 16-1-28-13.5(e). Now cleaning is not an alternative because the State of Indiana no longer believes washing is effective or enforceable. The defendants presented evidence that washing was ineffective, even if attempted conscientiously, because the specific contaminant to be removed would not be known and a dry van is not designed to be thoroughly cleaned.[9] Moreover, the difficulty and concomitant expense of administering a state-supervised cleaning program is apparent. The plaintiffs, in contrast, strenuously contend that there is no scientific evidence that crosshauling food with trash raises any health risks, and that any concerns of the State in this regard are irrational and emotional. Moreover, the plaintiffs argue that cleaning is effective and sufficient. Maybe the plaintiffs are correct. The Indiana legislature, however, is not required to wait for scientific verification and the

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[8]Although Justice Scalia would have the Court stop here and conclude that the backhauling ban is not invalid under the dormant Commerce Clause, the majority of the Supreme Court stands behind the limited balancing test set forth in *Pike*. *CTS Corp.*, 481 U.S. at 95 (Scalia, J., concurring).

[9]Dry vans are constructed of porous materials, and contain many cracks and crevices.

publication of learned articles before acting to alleviate what its constituents [*sic*] perceive as a health risk. Even if cleaning is, in a scientific sense, an adequate remedy, the legislature may determine that it is not an adequate remedy because of the difficulty in administration.

In addition to health benefits, the backhauling restriction in question will help protect the commercial reputation of Indiana products from the taint of being hauled in trucks that haul garbage. The evidence at trial showed that even commercial entities that are not involved in food products do not want their products transported in trucks that previously hauled trash. These shippers were concerned about potential adverse effects on product reputation. Plaintiffs counter that shippers have not reported any problems arising from their products being contaminated or picking up an odor attributable to crosshauling with trash; thus, the shippers' reaction is irrational. Again, plaintiffs miss the point. Maybe the public's reaction is irrational, but the shippers' reaction to public concern was rational. It is irrelevant whether the transported product was actually adversely affected; what is important is that the shippers do not want their product hauled in trash trucks.[10] Similarly, as evidence showed, in the public's opinion the commercial reputation of Indiana products will be protected if the products are not shipped in trucks which have previously carried trash.

c. Burdens on Interstate Commerce

Today, a broker must pay a trucker approximately $35 a ton for hauling municipal waste from New York to Indiana. If a dedicated fleet is used, the cost doubles to about $70 a ton. Including a typical tipping fee,[11], the total disposal cost of crosshauled trash is approximately $50 a ton. If a dedicated fleet

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[10]Shippers have rejected trucks because they are too clean. The thinking is that if a truck is very clean it must have been recently washed after hauling garbage. This illustrates that shippers are more concerned with reputation rather than the actual health risks.

[11]A tipping fee is the disposal fee that must be paid the landfill.

is used, the total cost for disposing of New-York-generated trash in Indiana is $85 a ton. The defendant brokers testify that transfer stations will not pay $85 a ton to dispose of waste, and accordingly, the effect of the backhauling ban is to eliminate the interstate transportation of waste to Indiana.

The reason, however, that the transfer stations will not pay up to $85 a ton to dispose of waste in Indiana is not that it is more expensive than disposing of the trash locally, but because Indiana will no longer be the cheapest state for the disposal of their trash. As previously set out, it costs up to $125 a ton to dispose of municipal waste in New York. Obviously, even at $85 a ton, disposing of trash in Indiana is still significantly cheaper than disposal in New York.

d. Conclusion on Backhauling Provision

Under the *Pike* test, a statute will be held unconstitutional only if the burden imposed on commerce is clearly excessive in relation to the local benefits. *Pike*, 397 U.S. at 142. In this case, the burdens imposed by the backhauling limitation are not clearly excessive when compared to the local benefits. The limitation does not violate the dormant Commerce Clause. First, the legislature is well within its rights to determine that backhauling poses health risks. Second, the alternative of cleaning is not administratively practical to police. Third, even if cleaning is technically equivalent to limiting crosshauling in a health sense, the provision limiting crosshauling protects the reputation of Indiana goods. Lower profits do not constitute a clearly excessive burden on interstate commerce in relation to these obvious benefits. Plaintiffs' motion for an injunction against enforcement of the backhauling prohibition is denied.

3. Vehicle Registration Provision

The vehicle registration program became effective on January 1, 1992. It provides that "a person engaged in the collection and transportation of municipal waste must have a valid municipal waste collection and transportation vehicle registration." Ind. Code § 13-

7-31-8. A copy of the registration and vehicle identification stickers must be carried at all times. Ind. Code § 13-7-31-8.2(c) and (d). Persons who own, lease, or operate more than one municipal waste collection and transportation vehicle may obtain one registration for all the vehicles. Ind. Code § 13-7-31-8.2(a). This statute does not distinguish between local trash haulers and national waste disposal companies. All vehicles used to haul trash must be registered and bear an identification sticker to dispose of municipal waste at an Indiana landfill.

Several categories of vehicles are exempt from the above registration/stickering requirements: vehicles that transport municipal waste generated by a person to a disposal site owned by that person and used exclusively by the person ("captive site exemption"); vehicles used to transport municipal waste from residences if the vehicle is operated by one residing in the residence ("resident's exemption"); and vehicles that are not used commercially for solid waste transportation ("non-commercial exemption"). Ind. Code §§ 13-7-31-1, -3.

a. Standard of Review

The vehicle registration program on its face does not distinguish between local and national haulers. However, plaintiffs argue that the practical effect of the provision displays local favoritism or protectionism. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. (1980). As set out above, a factor to consider is whether the provision treats both interstate and local businesses similarly. *CTS Corp.*, 481 U.S. at 87 (quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980)). This provision does so. Moreover, there is no evidence that an Indiana entity will benefit economically from the registration/stickering provision so it does not constitute economic protectionism. Accordingly, this Court finds that the *Pike* test applies to the registration/stickering provision.

b. Benefits to State

One of the main reasons for the vehicle registration program is so that all trash trucks will be readily identifiable, thereby

assisting Indiana in enforcing its backhauling prohibitions.[12] Intuitively, that knowledge of who is hauling the trash is a prerequisite to enforcement.

Not only will the registration/stickering requirements aid the State in enforcing the backhauling ban, but perhaps more importantly, it will promote private enforcement of the limitation. All sides agree that if shippers see the stickers, they will probably not use the truck. Thus, crosshauling will be reflectively eliminated by private enforcement. Any argument that the presence of a sticker will only marginally assist the State in public enforcement is not convincing. Simply put, the stickers will aid compliance with the backhauling ban. That is a benefit to the State of Indiana.

One of the most telling arguments for requiring a permanent sticker was made by a witness for the plaintiffs. He forthrightly stated that he would not voluntarily tell a shipper that a trailer had previously hauled trash because of the stigma attached to crosshauling. Accordingly, the truckers will provide the information the shippers desire only if forced, and the permanent sticker will supply the force.

c. Burdens on Interstate Commerce

As stated earlier, many customers of trucking companies refuse to load their goods onto any vehicle that has hauled municipal waste. Consequently, the plaintiffs candidly state that trucking companies would prefer that their customers remain unaware that their trailers have hauled municipal waste. Certainly, a permanent sticker would bring to the customer's attention the fact that the vehicle had previously hauled trash. Because of the stigma associated with the permanent sticker, or more correctly the fact that the truck had hauled garbage, many truckers would cease to haul garbage. The plaintiffs, despite believing that the shippers' concerns are irrational, nevertheless argue that this is a burden on interstate commerce. However, the dormant Commerce Clause does

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[12]This is true for either the new backhauling limitation or its predecessor passed in 1990.

not give trucking companies a constitutional right to conceal information from their customers.

Critical to the analysis of constitutionality of the vehicle registration program is the difference between a burden on interstate commerce and a burden on how an entity that deals in interstate commerce prefers to do business. The Commerce Clause bars discrimination against interstate commerce, but it does not protect a particular method of doing business. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88, 93-94 (1987); *Exxon v. Governor of Maryland*, 437 U.S. 117, 127 (1978). There is no doubt that enforcement of the vehicle registration program will greatly change how the plaintiffs do business. Presently, when brokering the transportation of out-of-state trash, the plaintiffs make *ad hoc* arrangements with truck drivers to haul trash on their return trips to Indiana. Neither the broker nor the trucker in any given arrangement knows more than a few days before the actual trip is made that the truck will require registration. Moreover, that truck may haul trash to Indiana only once a year. Accordingly, the $100 registration fee may be prohibitive. Defendants concede that this program will eliminate the practice of making impromptu contracts to haul trash; in fact, the statute was written to do this because this *ad hoc* procedure makes it very difficult to identify, and hold accountable, those who violate an Indiana law. Certainly, greater accountability of those who haul trash is a local benefit.

The thrust of the plaintiffs' argument against the registration and stickering requirements is that they are duplicative and ineffective. Plaintiffs claim that existing state disclosure requirements issued by the Indiana Department of Environmental Management ("IDEM") already allow the State to obtain all the information necessary for its lawful purposes. Moreover, the plaintiffs propound that the registration/sticker requirement will not enable the State to enforce the backhauling ban.

Plaintiffs contend that a permanent sticker requirement for trucks that haul municipal waste is inconsistent with allowing trucks that haul hazardous waste to display only a temporary placard. However, the concerns are different. Hazardous waste -- corrosive:, batteries, and the like -- is transported in sealed

containers. Municipal waste is not typically carried in sealed containers. Consequently, after hazardous waste is removed from a truck, the truck is clean. After municipal waste is removed from a truck, the truck contains remnants of the waste. The concern with transporting hazardous waste is the danger of contamination during the actual transportation, i.e. a traffic accident. However, the concern with transporting municipal waste is the danger of later, post-transportation contamination. Thus, requiring a permanent sticker for the hauling of municipal waste is not inconsistent with trip-based placarding required to haul hazardous waste.

d. Conclusion on Registration/Stickering Provision

Because the burden on interstate commerce is not clearly excessive when weighed against the local benefits, plaintiffs' motion for a declaratory judgment that the vehicle registration/stickering requirements violate the Constitution is denied. Indiana will benefit through private enforcement of the backhauling prohibition, and greater accountability of the entities involved in the disposal of municipal waste. The stigma associated with the permanent sticker, or more correctly the fact that the truck had hauled garbage, is not an unconstitutional burden on interstate commerce, nor is the fact that enforcement of the vehicle registration program will change how the plaintiffs do business. Plaintiffs' motion for declaratory judgment is denied.

4. Facial Challenges

The transfer-station inspection provisions, surety bond provisions, and disposal fee provisions will be analyzed on their face.[13] Oral argument on the constitutionality of these three provisions was heard on October 8, 1991. To be successful in a facial challenge, the plaintiffs must show that "the challenged law . . . could never be applied in a valid manner." *New York State*

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[13]*See Order on Partial Motion to Dismiss Under Rule 12(b)(1) For want of Case or Controversy*, IP 91 899 C (S.D. Ind. October 2, 1991) for discussion regarding ripeness of the contested provisions.

Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11 (1988). Inherently, this level of review involves a degree of conjecture and speculation, and places a great burden on the plaintiffs.

a. Transfer-station inspection provisions

Plaintiffs assert that HEA 1716, codified as Indiana Code § 13-7-10.5-16,[14] which directs the establishment of a uniform transfer-station inspection program, is unconstitutional. This program applies to transfer stations located both in Indiana and outside Indiana, directs that the costs are to be borne by the transfer stations inspected. The amount of the fees assessed is limited to the direct costs of carrying out the inspections. Rules to implement the program have not been promulgated, so it is impossible for the Court to consider the level of intrusiveness of the inspections. The inspections may be broad overviews, and therefore not intrusive. On the other hand, the inspectors may be required to look at each individual piece of trash.

Plaintiffs start their attack with the assertion that the uniform transfer station inspection program does little to protect Indiana's environment, and, at the same time, effectively precludes plaintiffs

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[14]Section 16 provides:

(a) The department shall establish a uniform transfer station inspection program to protect the health of the residents of Indiana and the environment of Indiana:

(1) for transfer stations located:

(A) inside Indiana; and

(B) outside Indiana;

that receive municipal waste and that engage in waste transfer activities; and

(2) under rules adopted by the solid waste management board.

(b) The solid waste management board shall establish fees payable by the transfer stations inspected. The amount of a fee imposed for the inspection of a transfer station may not exceed the cost of time and materials directly expended by the department, or a contractor hired by the department, for conducting the Inspection of the transfer station.

from arranging for the disposal of trash within Indiana. The Court's analysis of this claim is aided somewhat by the fact that all agree the provision must be measured against the *Pike* test. As set out above, the statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Plaintiffs argue that the transfer station inspections would be unnecessary, would preclude plaintiffs from disposing of any trash in Indiana, would halt the operations of the transfer station, and would be duplicative of an inspection done at the landfill.

Two United States Supreme Court cases touch on the issue of extraterritorial inspections: *Dean Milk Co. v. City of Madison*, 340 U.S. 349, (1951); and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 377 (1976). In *Dean Milk*, the Supreme Court said: "If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors." *Dean Milk*, 340 U.S. at 354-55. In *Cottrell*, the Supreme Court held that "[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, [a State] has the obvious alternative of applying its own standards of inspection to shipments of milk from a nonreciprocating State. *Dean Milk*, 340 U.S., at 355, expressly supported the adequacy of this alternative." *Cottrell*, 424 U.S. at 377.

In addressing this issue, the Seventh Circuit, in *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976), set aside as unconstitutional a Chicago ordinance concerning the inspection of out-of-state milk processing facilities. The Seventh Circuit initially addressed how *Cottrell* qualified *Dean Milk*. It determined that the qualifying language "means at least that if such assurance of substantial equivalence is present, the alternative of making its own inspection may not be available to the state authority. Whether it is available, we believe, depends on the results of applying the *Pike* balancing test." *Dixie Dairy*, 538 F.2d at 1308. Thus, an extraterritorial inspection is unconstitutional if the plaintiff shows (1) duplicity, and (2) a burden clearly excessive

in relation to benefit. Duplicity is measured in terms of other states' inspections, and not two inspections required by one state.

In *Dixie Dairy*, the plaintiff satisfied both requirements. The Seventh Circuit expressly found that the city inspections were duplicative of existing state and federal inspections, and the duplicative inspections would discourage processors from obtaining city permits. *Dixie Dairy*, 538 F.2d at 1308-10. However, unlike the instant case, *Dixie Dairy* did not involve a facial challenge, but rather challenged the inspection requirement as applied. An express finding of duplicity is not probable when a statute is challenged facially, and the plaintiffs have not shown duplicity in this case. As a result, any argument concerning the effects of applying the cost of inspections to the transfer state is premature, and need not be addressed by the Court. This is not to say that IDEM can ignore *Dixie Dairy* when it promulgates the rules associated with this provision. This Court humbly suggests that IDEM pay very close attention to the teachings of *Dixie Dairy*.

b. Surety bond provisions

This provision ostensively helps ensure the collection of civil penalties from out-of-state entities by requiring non-residents to post a surety bond with the Secretary of State of Indiana. Ind. Code § 13-7-10.5-15(1). The amount of the surety bond is not specified. The State argues that this provision will strengthen its ability to enforce its solid waste laws against out-of-state entities.

Because the surety bond provision creates two classifications of person involved in waste transfer activates distinguished only by the residence of the person, the elevated scrutiny test applies to plaintiffs' facial challenge. Under this test, the state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The first two prongs are easily satisfied; the surety bond provision enhances Indiana's ability

to enforce a judgment against an out-of-state operator. However, the provision cannot satisfy the third prong.

Plaintiffs point the Court to *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991). In *Voinovich*, an Ohio statute which required out-of-state persons transporting solid wastes to Ohio to file a consent to jurisdiction was challenged. In holding the provision unconstitutional, the court stated:

> The Ohio statute before us may be held to discriminate impermissibly against interstate commerce without extended inquiry. It plainly draws a distinction between intrastate and interstate commerce and places impediments on the latter. We reject the State's contention that the statute actually strives to achieve equality among all transporters of waste. It suggests that the provision is non-discriminatory because it compels entities who are not subject to the State's jurisdiction to consent to service of process in order to place them on par with persons who are already able to be served. It is simplistic to suggest that because the statute would lessen the burden on the State of serving carriers of waste that the statute treats in-state and out-of-state carriers equally.

Voinovich, 763 F. Supp. at 265. The court held that the service of process provision would bottleneck interstate commerce unnecessarily. *Voinovich*, 763 F. Supp. at 267.

Similarly, the surety bond provision in this case would pose an unnecessary burden on interstate commerce. Other provisions of the Indiana Code require out-of-state operators to register with IDEM, and this registration process should provide the State with all information it requires to adequately effectuate its judgments. Plaintiffs' motion to enjoin enforcement of this provision therefore is granted.

c. Disposal fee provisions

Indiana Code § 13-9.5-5-1(b)[15] provides that the Solid Waste Management Board may adopt rules imposing fees on trash generated outside Indiana in an amount to offset governmental costs attributed to the importation of such waste. The fee will be uniform throughout the State for all shipments of solid waste brought into Indiana. Defendants support this provision as necessary to repay Indiana citizens for public costs involved in the regulation and inspection of solid waste brought into Indiana.

The touchstone of cases upholding compensatory taxes is the "equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). Of course, if local and interstate commerce are to be treated equally, the additional burden which the interstate commerce causes the state must be identified. *Id.* at 758. After making this identification, a state is constitutionally permitted to level the playing field.

Plaintiffs again point the Court to *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991). In *Voinovich*, an Ohio statute required out-of-state wastes to be taxed at three times the rate of in-district wastes. Ohio defended this increased tax on out-of-state wastes because of the large volume of waste imported, the unique regulatory problems presented by foreign wastes, and the increased threat of hazardous waste materials entering Ohio. *Voinovich*, 763 F. Supp. at 262. In holding that none of the proffered reasons were sufficient to justify the distinction between domestic and foreign wastes, the court focused on whether the purpose of Ohio's tax was to raise revenue or to reimburse the Ohio for the costs of inspecting out-of-state

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[15]The statute provides:

> The solid waste management board shall adopt rules to establish and impose a fee on the general disposal or incineration of solid waste: (1) generated outside Indiana; and (2) in a final disposal facility in Indiana; necessary to offset the cost incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana.

waste. *Voinovich*, 763 F. Supp. at 263. After examining the statute, the court found that it was geared toward raising revenue to clean up landfills and not due to the additional costs of inspecting out-of-state wastes. *Voinovich*, 763 F. Supp. at 264.

Here, the statute does not set an arbitrarily high fee on out-of-state trash. On its face, the provision premises any additional charge to out-of-state haulers on the amount necessary to offset governmental costs attributed to the importation of such waste, and this is sufficient to give it facial validity. In this case, the computation of the correct amount of funds necessary to offset the costs incurred is complicated, but quantifiable. Ultimately, the State will have to justify whatever specific increase it imposes on out-of-state wastes. Until the statute is reviewed as applied, however, it is constitutional. Plaintiffs' motion as to this provision accordingly is denied.

III. Conclusion

The bottom line effect of the backhauling ban and the vehicle registration/stickering requirements is to force transporters of municipal waste to use a fleet of semi-dedicated trucks. A fleet of dedicated trucks provides accountability and at the same time eliminates the negative association of Indiana products being crosshauled with municipal waste. Although the plaintiffs logically do not want to alter their businesses so as to use semi-dedicated fleets, the State of Indiana in [*sic*] not constitutionally barred from requiring them to do so.

Plaintiffs' motion for declaratory relief is GRANTED as to the surety bond provision (Ind. Code § 13-7-10.5-15(1)), and DENIED in all other respects. The surety bond provision violates the Commerce Clause of the United States Constitution and cannot be enforced. Any claims or theories of recovery not specifically addressed in this order have been judged meritless. A judgment

effectuating this ruling will be issued contemporaneously with this order.

IT IS SO ORDERED this 5 day of February, 1992.

/s/ LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

DISTRICT COURT JUDGMENT OF FEBRUARY 5, 1992:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,	)	
Plaintiffs,	)	
v.	)	NO. IP91-899C
THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
Defendants.	)	

DECLARATORY JUDGMENT

Based on the evidence submitted at trial and the legal arguments of the parties:

IT IS DECREED, ORDERED ADJUDGED, and DECLARED that Indiana Code § 13-7-10.5-15(1) violates the Commerce Clause of the United States Constitution.

Therefore, IT IS FURTHER ORDERED that the defendants, the Honorable Evan Bayh, Governor of the State of Indiana, and the Honorable Kathy Prosser, Commissioner of the Indiana Department

of Environmental Management, are hereby PERMANENTLY ENJOINED from enforcing this statutory provision.

IT IS SO ORDERED this 5th day of February, 1992.

/s/ LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

DISTRICT COURT CORRECTED JUDGMENT OF FEBRUARY 25, 1992:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,	)	
Plaintiffs,	)	
v.	)	NO. IP91-899C
THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
Defendants.	)	

CORRECTED JUDGMENT

Based on the evidence submitted at trial and the legal arguments of the parties:

IT IS DECREED, ORDERED, ADJUDGED, and DECLARED that IND. CODE § 13-7-10.5-15(1) violates the Commerce Clause of the United States Constitution.

Therefore, IT IS FURTHER ORDERED that the defendants, the Honorable Evan Bayh, Governor of the State of Indiana, and the Honorable Kathy Prosser, Commissioner of the Indiana Department

of Environmental Management, are hereby PERMANENTLY ENJOINED from enforcing this statutory provision.

Those claims regarding the alleged re-enactment of the hauler and health-officer certification provisions previously found unconstitutional, regarding the service of process provision, and regarding the provision that allows local districts to bar waste are dismissed for lack of jurisdiction, in accordance with this Court's Order of October 2, 1991.

Judgment is entered for defendants on all remaining claims asserted in this case, in accordance with this Court's Orders dated October 2, 1991 (alleged restriction of federal remedy), and February 5, 1992 (all remaining claims).

IT IS SO ORDERED this 25th day of February, 1992.

/s/ LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

INDIANA STATUTES INVOLVED:

13-7-31-3. "Municipal waste collection and transportation vehicle" defined. – (a) As used in this chapter, "municipal waste collection and transportation vehicle" means a truck or railroad car used to transport municipal waste from a solid waste generator or a solid waste processing facility to a:

(1) Solid waste processing facility in Indiana; or
(2) Solid waste disposal facility in Indiana.

(b) The term does not include a vehicle that is:

(1) Used to transport municipal waste from a residence if the vehicle is owned, leased, or operated by an individual who lives in the residence; or
(2) Not used for commercial solid waste transportation.

13-7-31-6. "Vehicle" defined. – As used in this chapter, "vehicle" refers to a municipal waste collection and transportation vehicle.

13-7-31-8. Municipal waste collection and transportation vehicle licensing and inspection program. – (a) The department shall operate a municipal waste collection and transportation vehicle registration program.

(b) After December 31, 1991, a person engaged in the collection and transportation of municipal waste must have a valid municipal waste collection and transportation vehicle registration.

(c) A person engaged in the collection and transportation of municipal waste may apply for a municipal waste collection and transportation vehicle registration by completing and filing with the department, on a form provided by the department, information necessary for the department to implement this chapter and IC 13-7-10.5.

(d) Within thirty (30) days after receipt of a properly completed municipal waste collection and transportation vehicle registration application, the department shall issue to the applicant:

(1) A municipal waste collection and transportation vehicle registration; and

(2) Vehicle identification stickers; for each municipal waste collection and transportation vehicle owned, leased, or operated by the applicant.

13-7-31-8.1. Municipal waste collection and transportation vehicle registration. – (a) A municipal waste collection and transportation vehicle registration issued under this chapter is valid for two (2) years from the date the registration is issued.

(b) A municipal waste collection and transportation vehicle registration may be renewed by completing and filing with the department, on a form provided by the department, a renewal application at least thirty (30) days before the expiration of the registration.

13-7-31-8.2. Municipal waste collection and transportation vehicle registration for owners, lessees or operators of more than one vehicle. – (a) A person who owns, leases, or operates more than one (1) municipal waste collection and transportation vehicle must obtain one (1) municipal waste collection and transportation vehicle registration listing all municipal waste collection and transportation vehicles owned, leased, or operated by the person.

(b) A person described under subsection (a) must notify the department within thirty (3) days after the person acquires or disposes of a municipal waste collection and transportation vehicle. The department shall promptly issue the person the required number of new vehicle identification stickers.

(c) A copy of the current municipal waste collection and transportation vehicle registration must be carried at all times on each municipal waste collection and transportation vehicle owned, leased, or operated by the person to whom the registration is issued.

(d) Vehicle identification stickers provided by the department, indicating that the vehicle carries municipal waste, must be affixed adhesively at all times in a prominent location on each side of each registered municipal waste collection and transportation vehicle's cargo compartment or, at the option of the person to whom the registration is issued, on each side of a truck cab of a vehicle.

13-7-31-13.1. Use of vehicles. – A vehicle may only be used to collect and transport the following:

(1) Municipal waste.
(2) Special waste (as defined in 329 IAC 2-2-1 as in effect January 1, 1990).
(3) Hazardous waste regulated under:
    (A) IC 13-7-8.5; or
    (B) The federal Solid Waste Disposal Act (42 U.S.C. 6901 et seq. as in effect January 1, 1990).
(4) Waste described under IC 13-1-12-9 that results from the combustion of coal.
(5) Material that is being transported to a facility, except an incinerator or a landfill, for reprocessing or reuse.
(6) Wood, concrete, brick, and other construction and demolition materials.
(7) Dirt, sand, gravel, asphalt, salt, and other highway maintenance material.
(8) Coal, gypsum, slag, scrap metal, and other bulk industrial commodities.
(9) Infectious waste (as defined under IC 16-1-9.7-3).

13-7-31-16.1. Fees. – (a) The department shall charge the following fees:

(1) One hundred dollars ($100) to:
    (A) Issue; or
    (B) Renew;
a vehicle registration under this chapter.
(2) One dollar and fifty cents ($1.50) per vehicle for vehicle identification stickers.

(3) Fifty cents ($0.50) for a municipal waste transportation manifest.

(b) Fees collected under this section shall be deposited in the municipal waste transportation fund established under section 16.5 of this chapter.

13-7-31-16.5. Municipal waste transportation fund. – (a) The municipal waste transportation fund is established for the purpose of assisting the department to implement this chapter. The fund shall be administered by the department.

(b) Sources of money for the fund are fees collected under section 16.1 [IC 13-7-31-16.1] of this chapter.

(c) The treasurer of state shall invest the money in the fund not currently needed to meet the obligations of the fund in the same manner as other public funds may be invested. Interest that accrues from these investments shall be deposited in the fund.

(d) Money in the fund at the end of the state fiscal year does not revert to the state general fund.

(2)

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-821

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE HONORABLE EVAN BAYH GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
Petitioners

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does not the dormant Commerce Clause render unconstitutional facially neutral statutes which are designed to and do bar the importation of out-of-state generated municipal wastes, where no meaningful evidence supporting the *post hoc* justifications proffered by the petitioners is introduced into evidence and the proffered justifications are not advanced by the statutes?

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OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1 to Petition for Writ of Certiorari) is now reported at 975 F.2d 1267 (7th Cir. 1992). The Opinion of the district court (App. 35 to Petition for Writ of Certiorari) is not yet reported.

STATEMENT OF THE CASE

I. INTRODUCTION

A. Respondents And Their Role In Interstate Commerce.

The respondents/plaintiffs are Pennsylvania corporations that broker shipments of municipal solid waste ("MSW") which originate in New York, New Jersey, and Pennsylvania. They act as middlemen between transfer and recycling stations, where the waste is sorted and/or stored after curbside pickup, and truckers who then transport the MSW in tractor trailers for disposal in Indiana and other states. Respondents do not haul the solid waste or own the trucks, transfer stations, or landfills. Respondents' arrangements with each transfer station, trucker, and landfill are *ad hoc* and consummated by daily telephone calls.

Because landfill space is at a great premium in the east, the cost of dumping MSW in east coast facilities is as high as $125 per ton. Since Indiana landfills charge only $15 per ton, it was cheaper to dispose of MSW in Indiana landfills even though the transportation cost was $35 per ton, prior to the enactment of the statutes successfully challenged by respondents.

Individual truckers may haul MSW to Indiana only once in several years. [*E.g.*, A. 217-304.][1] Each load is transported on an *ad hoc*, one-time basis. Neither the

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1. Materials in the Appendix bound with the Petition for Writ of Certiorari are cited "App. _____". Materials in the record submitted to the Seventh Circuit are cited "A. _____".

broker nor the trucker knows significantly in advance that any specific vehicle will be used for transporting MSW.

Virtually all MSW transported in interstate commerce from the east coast to Indiana is transported in tractor trailers. [A. 454, 488-492; 376, 404-405; 217.] These are the same vehicles which haul raw and manufactured goods and commodities in interstate commerce. Indiana generated MSW is shipped intrastate for disposal in Indiana landfills in traditional, dedicated garbage trucks. [App. 8.]

Interstate truckers who have hauled goods from Indiana, and elsewhere, as a front haul must return to some point for their next front haul. Rather than run empty, since operating costs do not significantly change whether the truck is empty or fully loaded, respondents arrange for the truckers to back haul MSW, for which the trucks receive a small fee, sufficient to cover their operating costs. Respondents do 80% and 60% of their business respectively in Indiana, given the combination of low disposal fees and Indiana's central location to midwest markets and manufacturing centers. The interstate truckers' main source of income is the front haul. [*See* App. 7-9; 42-44.]

B. Procedural History.

On August 9, 1991, respondents filed a Complaint for Declaratory Judgment, later amended, together with a Motion for Injunctive Relief respecting ten provisions of Indiana legislation which respondents contended violated the Commerce Clause and the Fourteenth Amendment to the United States Constitution, cognizable under 42 U.S.C. § 1983, jurisdiction residing in the Court pursuant to 28 U.S.C. §§ 1331 and 1343.

Only three provisions are at issue by the Petition for a Writ of Certiorari:

> The municipal waste collection vehicle registration/stickering provisions, IC 13-7-31-8; 8.2(c)

and (d); 13-7-31-16.1; 13-7-31-13.3; and 13-7-31-14; and the back haul ban, IC 13-7-31-13.1.

The trial court determined to conduct an evidentiary hearing on the back haul ban and registration/sticker provisions [A. 61, 78], which occurred on November 7, 8, 12, 13, and 14, 1991. On February 5, 1992, the trial court denied respondents relief. [App. 35-68.] On February 6, 1992, the trial court denied respondents' motion for an injunction pending appeal, and respondents' filed a notice of appeal. [A. 9.]

On February 7, 1992, respondents filed with the Seventh Circuit Court of Appeals a motion for injunction pending appeal and emergency motion for expedited appeal and expedited review, seeking to preclude petitioners from enforcing the registration/sticker program and back haul ban. On February 7 and 10, 1992, the Seventh Circuit issued Orders enjoining enforcement of the back haul ban and vehicle registration/sticker program through the course of respondents' appeal, and set an accelerated briefing and argument schedule. [A. 11, 14.]

On September 17, 1992, the Seventh Circuit reversed the judgment of the trial court, holding that the back haul ban and vehicle registration/stickering program, separately and together, violate the dormant Commerce Clause. [App. 1-34.]

The Petition for a Writ of Certiorari, filed on or about November 10, 1992, is limited to attempting to secure this Court's review of the Seventh Circuit's determinations that the back haul ban and vehicle registration/stickering program are unconstitutional, on Commerce Clause grounds.

C. The Seventh Circuit's Opinions And Orders.

In sustaining the back haul ban and vehicle registration/sticker program, the trial court held that elevated scrutiny did not apply. It then determined that irrational

and emotional perceptions held by some constituents of a health risk from crosshauling [App. 53-54], and irrational and emotional fears of damage to commercial reputation held by some shippers or constituents arising from crosshauling [App. 53-54, 57], absent any facts or scientific data, constituted a cognizable *Pike* putative local benefit, rendering the statutes constitutional.

In enjoining enforcement of these statutes pending disposition of respondents' appeal, the Seventh Circuit expressed grave concern over the trial court's analysis:

> "[T]he district court has concluded that an unfounded, indeed irrational, public reaction supports legislation that places a substantial burden on interstate commerce. It may be that politicians (and shippers) must concern themselves with unreasoned public opinion; it is far less clear that the Constitution allows a state to burden interstate commerce on this account."

[A. 11-12.]

This concern carried over to the disposition of this case on the merits. The Seventh Circuit began its analysis of the merits of the back haul ban and vehicle registration/stickering program by noting that under the dormant Commerce Clause, and as it applies to the interstate commerce in out-of-state generated wastes, this Court's Opinions in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____ , 112 S.Ct. 2019, 2023 (1992), and *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), striking down Michigan and Alabama laws discriminating against interstate commerce in wastes, reaffirmed a "basic" principle underlying *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978):

> "One state may not 'isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.' *Philadelphia v.*

New Jersey, 437 U.S. at 628; *see Chemical Waste*, 112 S.Ct. at 2012; *Fort Gratiot*, 112 S.Ct. at 2024."

[App. 16.] It then analyzed whether the back haul ban and its attendant registration and stickering provisions erected such a barrier. Although facially neutral, the Seventh Circuit concluded, based upon this Court's precedent, that the effect of the back haul ban was to discriminate against interstate commerce because it reduced very significantly the in flow of out-of-state wastes. This reduction required that the statutes be subjected to elevated scrutiny, not the *Pike* test, thereby mandating that the petitioners establish that the discrimination was demonstrably justified by a valid factor unrelated to economic protectionism, in order to save the statutes. [App. 17-21.]

The efforts to demonstrably justify valid factors unrelated to economic protectionism are the state's proffers of its substantial interests in public health and commercial reputation. The Court was struck by the absence of evidence of health risk or any adverse commercial reputation to any Indiana manufactured products, or anywhere else for that matter, as a result of hauling those goods in a vehicle which had transported solid wastes. Indeed, finding the back haul ban and vehicle registration and stickering programs an obvious effort to saddle those outside the state with the entire burden of slowing the flow of refuse into the state's remaining landfills, the Seventh Circuit declared these statutes unconstitutional. [App. 21-23.]

Respecting the registration and sticker alone, the Court noted that the sticker permanently and universally identified a vehicle as one which is registered in Indiana to carry MSW, telling nothing about whether or when the vehicle has in fact carried MSW into Indiana or some other state. Moreover, since no sticker provided the date of the last garbage haul, if any, the sticker was of no utility. Thus, the Seventh Circuit found that the stickering was not effective in providing information on a truck's past haulage;

rather, it would serve only to divert the flow of waste from Indiana by discouraging shippers through sticker stigma from using vehicles which have been registered. The Seventh Circuit found, as well, that given the occasional hauler of municipal solid waste, the per haul cost of the registration fee alone rendered the fee a discriminatory unapportioned tax, unconstitutional under *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987). Indeed, Indiana conceded that the statute was aimed at eliminating the practice of making *ad hoc* contracts to haul trash. [App. 24-27, 50.]

After finding the surety bond and tipping fee provisions unconstitutional, neither of which are challenged by petitioners' application, the Seventh Circuit noted that even under *Pike v. Bruce Church, Inc.*, 297 U.S. 137 (1970), the back haul ban, registration and stickering programs violated the Commerce Clause [App. 32-34] because the statutes, if enforced, would effectively bar the importation of out-of-state wastes into Indiana, that burden being clearly excessive in relation to the putative local benefits ascribed to the statutes.

II. INDIANA'S CAMPAIGN AGAINST OUT-OF-STATE WASTE

The Opinion of the Seventh Circuit found unconstitutional a second generation of statutes aimed at stopping commerce in out-of state generated wastes, the first generation having been decreed unconstitutional in December 1990. Each set of statutes declared unconstitutional resulted from bicameral, bipartisan efforts of the legislature and administration to stop out-of-state wastes.

In 1990, in order "to take aggressive action to insure that Indiana did not become the dumping-ground of trash from the east coast", the Governor of the State of Indiana, its Commissioner of the Department of Environmental Management ("IDEM"), and others lobbied for and passed HEA 1240, which was heralded as a measure that "will

help stop the importation of out-of-state garbage into Indiana". [A. 188-190, 191-194, 195, 196-197.][2]

Respondents Government Suppliers Consolidating Services, Inc. and Jack Castenova, Inc. challenged three provisions of HEA 1240: a disposal fee provision [Indiana Code § 13-9.5-5-1]; a hauler certification [Indiana Code § 13-7-22-2.7(c)(1)]; and a health officer certification [Indiana Code § 13-7-22.2.7(c)(2)].

On December 27, 1990, the Honorable Daniel J. Tinder of the United States District Court for the Southern District of Indiana found each of these statutes unconstitutional, as violative of the dormant Commerce Clause. *Government Consolidating Serv. v. Bayh*, 753 F.Supp. 7[illegible] (S.D. Ind. 1990). That very day, Governor Bayh responded to the adverse "consequences of the unfettered flow" of out-of-state municipal wastes, vowing that "we will not let down in the fight". [A. 201-202.] On January 25, 1992, in announcing that he would not appeal Judge Tinder's decision, Governor Bayh reiterated his commitment to "stopping Indiana from becoming a dumping ground for east coast garbage." [A. 203-205.]

The 199[illegible] State of the State Address [A. 210-212] noted the "intolerable" situation attributable to the striking down by Judge Tinder of the legislation enacted in 1990 "to stem the tide of out-of-state waste", which the Administration would redress. The mechanisms chosen to redress "the intolerable situation" were the back haul ban and registration/sticker program presented by the Governor's designated spokesperson on environmental matters as an amendment to the Administration's environmental bills.

That the intent and effect of the amendments were to curb the disposal of out-of-state generated municipal waste

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2. The Governor recited in his State of the State Address that "what must be stopped is the tidal wave of out-of-state trash that threatens to turn Indiana into a dumping ground", which trash was "coming by the truck load". [*Id.*]

in Indiana landfills is readily gleaned from the pronouncements and writings of the Administration officials. One need look no further than the testimony of defendant Kathy Prosser, Commissioner of the Indiana Department of Environmental Management, and her article entitled "Out-Of-State Waste: We Need A National Solution", published shortly before Governor Bayh signed the statutes at issue. [A. 206-207.] Ms. Prosser noted that disposal companies in the northeast were trucking their garbage westward due to the vast difference in tipping fees and that, despite Judge Tinder's Opinion, Indiana continues to "aggressively pursue measures in-state" to deal with the influx of out-of-state generated municipal wastes, such measures including "legislation outlawing back hauling, special licensing and placarding for solid waste vehicles." [A. 379-381.] It is, therefore, not surprising that the Seventh Circuit commented that the course of events surrounding the enactment of the back haul ban and vehicle registration/stickering program suggest that they were motivated by a discriminatory purpose:

> "The appellants characterize the statutes' effects on interstate commerce as incidental; in fact, the 'circumstances of enactment suggest that it was the principal objective' of the statutes to impede importation of trash. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 39 (1980)."

[A. 19].

Judge Tinder's Opinion had delineated with specificity the role that tractor trailers played in transporting out-of-state generated municipal wastes to Indiana for disposal in Indiana landfills. *See, e.g., Government Suppliers, supra*, 753 F.Supp. at 748-750, 752-753.

Learning from Judge Tinder's detailed description, in May of 1991 Indiana passed a series of new statutes designed to keep out-of-state generated MSW from disposal in Indiana landfills. Some provisions, although facially neutral, were crafted to preclude the long haul

transport of municipal solid waste to Indiana landfills by tractor trailer, as the business had been described by Judge Tinder. Indeed, these statutes erected economic barriers to interstate commerce in out-of-state generated wastes.

III. ECONOMIC BARRIER TO INTERSTATE COMMERCE ERECTED BY THE STATUTES

The back haul ban, IC § 13-7-31-13.1, restricts the hauls which a municipal waste vehicle can carry to MSW, construction debris, highway maintenance materials, and hazardous or special wastes. [App. 73.] No vehicle which hauls any of these other categories of wastes is restricted in what it can haul, so long as it is not registered to haul MSW.

The municipal waste vehicle registration/sticker program, IC §§ 13-7-31-3, 6, 8.2, 14 and 16.1, requires that each vehicle transporting MSW must have a registration from IDEM, which lists all vehicles owned, leased, or operated by the transporter, and which must be carried on each vehicle registered at all times. In addition, each registered vehicle must bear two municipal waste stickers *at all times* in a prominent location on each side of the registered vehicle cargo compartment or truck cab. [App. 71-73.] There is a flat $100 fee for each registration regardless of the number of vehicles owned, leased or operated, and a $1.50 fee per vehicle for stickers. [App. 73.] The registration fee is unaffected by the number of hauls or amount of MSW disposed in Indiana. No loads of MSW may be disposed at an Indiana landfill unless the vehicle bears the stickers.[3] Indiana has up to 30 days within which to issue the registration and sticker. [IC § 13-7-

3. Generators, brokers, and transporters involved in the disposal of MSW at Indiana landfills have to submit manifests accompanying each load. [IC §§ 13-7-31-12, 14.] The manifests require the identification of the generator, the description of the wastes, the identification of the transporter, broker, and the identification of the vehicle carrying MSW.

318(d); App. 72.] No mechanism for prompt issuance was contemplated or extant.

The effect of the back haul ban and municipal waste vehicle registration/sticker program is to eliminate the disposal of out-of-state generated MSW in Indiana by making it so costly to back haul MSW that no vehicle operator will do so. This effect is accomplished by the back haul ban, which requires that the vehicles be dedicated to the non-profitable hauling of MSW, and enforced by the registration/sticker program, which assures that all potential customers will know that the vehicle is registered to haul MSW. The necessary effect of the statutes is to force haulers to choose between using their multi-purpose tractor trailers only for hauling MSW, or to eschew back hauling MSW altogether, thereby eliminating the only means of bringing out-of-state MSW to Indiana.[4] The former requires so substantial an increase in trucking fees that even were haulers to dedicate their trailers to MSW, no MSW would be disposed in Indiana. Thus, the effect of the statutes is to isolate Indiana from out-of-state MSW by eliminating cross-hauling of goods and products with MSW, the only means through which out-of-state generated MSW is transported to Indiana, or by increasing costs to such an extent that no trailers can dispose MSW in Indiana, even if haulers dedicate their trailers to MSW.

Since virtually all in-state generated solid wastes disposed of in Indiana landfills were hauled in traditional garbage trucks [App. 8; 53], and none were hauled in tractor trailers, these statutes, effectively barring the utilization of tractor trailers to back haul municipal solid waste to Indiana landfills would drastically reduce the volume of such wastes in interstate commerce, as the Seventh Circuit found. [App. 19, 20, 34.]

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4. Traditional garbage trucks cannot be used to long haul out-of-state generated MSW. [*E.g.*, A. 431-432.] There are no fleets of dedicated tractors/trailer trucks available for hauling out-of-state generated MSW. [A. 683, 693; 623; 628-630.]

IV. NO EVIDENCE OF ADVERSE HEALTH EFFECTS OR DAMAGE TO COMMERCIAL REPUTATION

The petitioners defended the statutory enactments challenged by raising the *post hoc* justifications of adverse health effects and damage to commercial reputation of Indiana goods arising from the cross-hauling of goods in vehicles which have hauled solid wastes.[5]

Both the Seventh Circuit and the trial court found there was no scientific evidence that cross-hauling even food with MSW raised any health related concerns.[6] [App. 21-22, 53-54.] The record is devoid of any trucker, shipper, or anyone else ever reporting or being made aware of any adverse health effect resulting from the cross-hauling of any products whatsoever with MSW. Even petitioners' own witness so testified. [A. 447, 448.]

In addition, both the Seventh Circuit and the trial court found there was no evidence of diminished commercial reputation resulting from cross-hauling. [App. 22, 54.] No petitioner or witness testified to any instance in which any manufactured good was adversely affected in any way from having been cross-hauled in a trailer which carried MSW.

REASONS FOR DENYING THE PETITION

Five months ago, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of National Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992), and in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), this Court reaffirmed the principles set forth in *City*

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5. Were "elevated scrutiny" applicable, petitioners needed to establish valid factors unrelated to economic protectionism which demonstrably justified discrimination. Were *Pike* applicable, petitioners needed to establish a legitimate local public interest and putative local benefit.

6. Respondents did not challenge Indiana's statute restricting the cross-hauling of food and MSW.

of Philadelphia v. New Jersey, 437 U.S. 617 (1978), and applied elevated scrutiny to strike down both facially neutral and facially discriminatory state enactments because the effect of each was not even-handed; rather, each erected a barrier to interstate commerce in out-of-state generated wastes. One may fairly ask why this Court should again review the constitutionality on Commerce Clause grounds of another state's enactments which the trial court and Seventh Circuit found had the effect of barring the importation of MSW into Indiana [App. 34, 57, 55, 51][7] and which the trial court, in part, and the Seventh Circuit found were enacted with the principle objective of impeding the importation of out-of-state generated wastes. [App. 19, 58.]

This question is even more compelling because petitioners do not even cite to *Chemical Waste Management* or *City of Philadelphia* and reference *Fort Gratiot* only in a footnote, and for an inapposite proposition. Petitioners do not even suggest that the Seventh Circuit's Opinion misunderstands or misapplies *Fort Gratiot* or *Chemical Waste Management*, or *City of Philadelphia*.

Rather, petitioners suggest that the Seventh Circuit erred by subjecting Indiana's statutes to elevated scrutiny. They contend that because the enactments are facially neutral, any "disparate impact" on interstate commerce does not violate the dormant Commerce Clause. In so suggesting, petitioners express two fundamental misunderstandings of this Court's precedent and the Seventh Circuit's Opinion.

This Court has repeatedly struck down any state statute which has the purpose or effect of blocking interstate commerce at a state's borders, regardless of whether

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7. The Seventh Circuit found that the statutes had the effect of barring the importation of MSW. The district court, while making no such specific finding, in discussing each statute *seriatim*, did note that the result of each was to restrict the amount of MSW coming into Indiana.

the enactment is facially neutral or facially discriminatory. The question is whether the statute even-handedly impacts upon interstate and intrastate commerce and not the artful wording used by the legislature. Second, this Court has upheld state statutes regulating the manner in which interstate entities conduct their business affairs only if the amount of interstate commerce is not diminished *and* adherence to those statutes imposes no additional burdens solely upon out-of-state persons involved in that commerce. In striking down Indiana's statutes, the Seventh Circuit was merely following this Court's precedent, crafting no new theory of "disparate impact".

Finally, since the burden on commerce imposed by the Indiana statutes as found by both the trial court and the Seventh Circuit is to "effectively bar the importation of out-of-state waste into Indiana" [App. 34, 58], and since the Seventh Circuit and even the trial court concluded that the asserted health and commercial reputation benefits advanced to support the statutes were neither supported by meaningful evidence nor safeguarded by the statutes [App. 21-23, 24, 33-34, 53-54], the Seventh Circuit's declaration of unconstitutionality is unassailable, regardless of whether elevated scrutiny or the *Pike* test applies.

Given the virtual cessation of commerce caused by the challenged statutes and the absence of any evidence suggesting a valid local benefit, petitioners' question presented is not before this Court, even were their analysis of the Commerce Clause correct. Since their analysis is fundamentally wrong, no basis for this Court's assumption of jurisdiction exits.

I. DISCRIMINATORY EFFECT IS A WELL-SETTLED BASIS FOR APPLYING ELEVATED SCRUTINY TO STATE STATUTES

In ruling against petitioners, the unanimous panel Opinion of the Seventh Circuit Court of Appeals took the facts as found by the district court [App. 7], and concluded

that the statutes crafting the back haul ban and registration/stickering program violate the Commerce Clause because they (1) "would effectively bar the importation of out-of-state waste into Indiana"; (2) which burden "is clearly excessive in relation to the putative local benefits of the statutes"; and (3) that the blithe assertions that Indiana manufactured goods may suffer a tarnished reputation from being contaminated during shipment in trailers which may have hauled MSW to Indiana only, and that Indiana citizens may suffer adverse health effects from receiving goods transported in trailers which may have hauled municipal solid waste to Indiana, were unsupported and unsupportable. [App. 34, 21-22.]

The Seventh Circuit also found that means far less disruptive to interstate commerce than the back haul ban and vehicle registration/stickering program were available, but not enacted, which is not surprising because, as the Seventh Circuit opined, "the circumstances of enactment suggest that it was the principal objective of the statutes to impede the importation of trash." [App. 19.]

Regardless of the standard used to measure the validity of these statutes against the strictures of the Commerce Clause, it is obvious that the cessation of interstate commerce weighed against proffered speculative and unsubstantiated local benefits, each of which could be met with less intrusive means, requires that the statutes be deemed unconstitutional. The Seventh Circuit so found under both the "elevated scrutiny" standard enunciated in, *inter alia*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and the lesser level of scrutiny enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), because the statutes violated the cardinal tenet of *City of Philadelphia*:

> "One state may not 'isolate' itself from a problem common to many by erecting a barrier against the movement of interstate trade.' *Philadelphia v. New Jersey*, 437 U.S. at 268; *see Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112

S.Ct. 2009, 2012 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019, 2024 (1992)."[App. 16.]

Petitioners contend that their quarrel is only with the Seventh Circuit's utilization of the elevated scrutiny standard, and not the application of that standard. They aver that since the statutes are facially neutral, elevated scrutiny does not apply, thereby authorizing a disproportionate impact on out-of-state persons involved in interstate commerce. This contention ignores the virtual cessation of all commerce in out-of-state generated municipal wastes by instate and out-of-state persons. It is also contrary to this Court's pronouncements.

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court deemed unconstitutional a statute whose effect was to restrict the disposal within New Jersey of out-of-state generated wastes. In the course of ruling, this Court applied elevated scrutiny in the absence of ascribing a legislative purpose because "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia*, *supra*, 437 U.S. at 626. Finding that the statute constituted an illegitimate means of isolating the state from the national economy, this Court opined that the linchpin of the statute's unconstitutionality was its discriminatory effect by erecting the barrier against the movement of interstate trade:

> "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."

Id. at 628.

It was the requisite "alertness to the evils of economic isolation and protectionism" which compelled this Court to conclude that either discriminatory effect or discriminatory purpose is sufficient to trigger the virtually *per se* rule of

invalidity, occurring on application of the elevated scrutiny standard. The law has remained the same.

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ____, 112 S.Ct. 2009 (1992), striking down on Commerce Clause grounds an Alabama statute imposing an additional disposal fee on out-of-state generated hazardous waste, this Court applied the elevated scrutiny test, not because the statute's additional fee facially discriminated against out-of-state generated hazardous wastes, but rather, because of discriminatory effect:

> "Invalidity under the Commerce Clause necessarily follows, for 'whatever [Alabama's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently.' (Citations omitted.) The burden is on the state to show that 'the *discrimination* is demonstrably justified by a factor unrelated to economic protectionism.' "

Chemical Waste Management, supra, 504 U.S. ____, 112 S.Ct. at 2015 (emphasis in original).

Chemical Waste Management discussed the concept of economic protectionism, as set forth in *City of Philadelphia, supra*. This Court noted that the Alabama Supreme Court had found no economic protectionism, based upon its conclusions that the legislature had been motivated by public health and environmental concerns. In response, this Court noted:

> "This narrow focus on the intended consequence of the additional fee does not conform to our precedents, for '[a] finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising*

> *Comm'n*, 432 U.S. 333, 352-353 (1977), or discriminatory effect, *see Philadelphia v. New Jersey, supra*.' (citation omitted). The 'virtually *per se* rule of invalidity,' *Philadelphia v. New Jersey, supra*, 437 U.S. at 624, applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade. *Maine v. Taylor*, 437 U.S. 131 (1986)'."

Chemical Waste Management, supra, 504 U.S. ____, 112 S.Ct. at 2015, n.6.

The same day that *Chemical Waste Management* was decided, this Court decided *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. ____, 112 S.Ct. 2019 (1992). *Fort Gratiot* applied elevated scrutiny to strike down on Commerce Clause grounds a Michigan statute which authorized each county to bar the disposal of all out-of-county wastes, whether generated within or without the state, due to economic protectionism evidencing discriminatory effect:

> "The Waste Import Restrictions enacted by Michigan authorized each of its 83 counties to isolate itself from the national economy. . . . the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas. In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reason would appear to control the disposition of this case."

Fort Gratiot, supra, 504 U.S. ____, 112 S.Ct. at 2024.

The petitioners had argued that, as opposed to the New Jersey statute reviewed in *City of Philadelphia*, the

Michigan statute did not discriminate against interstate commerce because it treated wastes from other Michigan counties no differently than wastes from other states. This Court rebuked that contention, based upon discriminatory effect:

> "[O]ur prior cases teach that a state (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the moving of articles of commerce through subdivisions of the state, rather than through the state itself."

Fort Gratiot, *supra*, 504 U.S. ____, 112 S.Ct. at 2024. Indeed, finding that the statute constituted economic isolation and protectionism, this Court concluded that the waste import restrictions "unambiguously discriminate against interstate commerce" [*id.*, at 2027].

Thus, in waste disposal cases, this Court has applied elevated scrutiny to statutes whether facially neutral or facially discriminatory because the inquiry is whether the statutes treat interstate and intrastate commerce even-handedly, and not whether the language of the enactments disguises protectionist means or ends.

Therefore, petitioners' contentions that the Seventh Circuit misinterpreted this Court's precedent in striking down the back haul ban and vehicle registration/stickering program are simply unsupportable.

II. LIMITING ELEVATED SCRUTINY TO FACIAL DISCRIMINATION WOULD REVERSE NUMEROUS DECISIONS OF THIS COURT AND EMASCULATE THE DORMANT COMMERCE CLAUSE

This Court's analysis of Commerce Clause cases regarding waste disposal is consistent with its treatment of all other Commerce Clause cases challenging state enactments — if statutes are intended to and do result in more than an incidental diminution of interstate commerce in specific articles, they are subject to elevated scrutiny and

are struck down. For example, based upon the determination that discriminatory purposes or discriminatory effects erect a barrier to commerce, this Court has applied elevated scrutiny to state enactments (1) directly discriminating against out-of-state generated commodities themselves [*e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-271 (1984); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891)]; (2) indirectly discriminating against those commodities by requiring adherence to facially neutral state packaging regulations [*e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-52 (1977)]; and (3) discriminating against commodities by taxing the person or means of transaction of commerce through facially neutral statutes [*e.g.*, *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491 (1989); *Best & Company, Inc. v. Maxwell*, 311 U.S. 454, 455 (1940)].[8]

Petitioners suggest that the Seventh Circuit has misinterpreted this Court's precedent by applying elevated scrutiny to strike down a facially neutral statute based upon its "disparate impact", a term the Seventh Circuit does not even use in its Opinion. In so contending, petitioners do note that this Court's Opinion in *Hunt v. Washington State Apple* is contrary to their position. [Petition for Writ, 14, 15.] So is *Fort Gratiot*. At bottom, petitioners' contention falls because they fail to recognize that this Court has repeatedly applied elevated scrutiny to strike down statutes challenged on Commerce Clause grounds if the

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8. Indeed, this Court has even struck down facially neutral state statutes which were intended to and did regulate only vehicles used to transport articles in commerce, and not the articles themselves, utilizing both special scrutiny and *Pike* standards in majority, plurality, and concurring opinions. *E.g.*, *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (truck length); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) (truck length); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526 (1959) (truck flaps); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (train length).

legislative means or legislative ends reflect a state's isolation from a common problem by erecting a barrier against the movement of interstate trade. Although facial discrimination may tend to suggest the proscribed discriminatory purpose or discriminatory effect, facially neutral statutes may suffer from the same defects, as well.

Indeed, petitioners' disparate impact theory premised upon a facially neutral statute constitutes a fundamental misreading of even *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the case on which its analysis hinges. *Pike* said nothing about facially neutral statutes; rather, *Pike* noted that the elevated scrutiny test does not apply:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."

Id., at 142. Under such circumstances, *Pike* noted that the statute:

> "Will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Id., at 143.

Pike's concern has always been the paramount concern of this Court. In *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951), this Court struck down a facially neutral city ordinance challenged on Commerce Clause grounds which was not even-handed in effect, noting that to do otherwise would emasculate the Commerce Clause "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods". In *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940), this Court struck down a facially neutral statute, noting that the Commerce Clause "forbids discrimination; whether forthright or ingenious". *Accord*, *Nippert v. City of Richmond*, 327 U.S. 416 (1948).

Thus, elevated scrutiny has been applied to strike down facially neutral statutes challenged on Commerce Clause grounds, since the question is not artful drafting but rather discriminatory effect. To hold otherwise, as petitioners suggest, overturns a continuum of over one hundred years of Commerce Clause decisions of this Court, beginning with *Brimmer v. Rebman*, 138 U.S. 78 (1891).

III. THE PETITIONERS' CLAIM OF ERROR IS UNDERCUT BY THE AUTHORITIES ON WHICH THEY PURPORT TO RELY

Petitioners rely on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) to support their contention. In fact, these cases do no such thing.

In *Exxon Corp.*, this Court upheld a facially neutral statute which had the effect of barring refiners from owning retail gas stations in Maryland. No oil company had a refinery in Maryland. In finding no Commerce Clause violation, this Court concluded that the statute did not discriminate against interstate commerce because Maryland's entire gasoline supply flowed in interstate commerce in the absence of any local producer or refinery. Indeed, relying on *Hunt* and *Dean Milk*, this Court noted that were the effect of the regulation to diminish gasoline flowing in interstate commerce, a different result would ensue. *Exxon*, *supra*, 437 U.S. at 126 n.16.

Thus, this Court recognized a distinction between discriminating against articles in commerce themselves, as opposed to regulating the structure of entities conducting the commerce. This, of course, is consistent with this Court's analyses set forth above.

Petitioners' reliance on *CTS* evidences yet again their misunderstanding of this Court's Commerce Clause analysis. In *CTS*, this Court affirmed a state enactment which, for a subset of some entities formally incorporated within

Indiana, created procedures applicable to all persons seeking to obtain controlling shares of stock in the state's corporation. The article in commerce was the shares of those certain Indiana corporations. The shares themselves were unaffected by the Act, and no barriers to entry into the state were created by the legislation. The Act had the same effects on tender offers, whether or not the offerer was a resident of Indiana, and, therefore, visited its effects equally upon both out-of-state and local persons. This Court found no Commerce Clause violation since the burden of the state's regulation fell not on the article of commerce itself, but rather upon those most likely to attempt a hostile takeover who this Court assumed resided out-of-state. *CTS*, *supra*, 481 U.S. at 88.

By contrast, the Seventh Circuit found that Indiana statutes imposed a substantial burden upon the MSW in commerce itself. In addition, the Court also opined that the statutes imposed far greater burdens on persons involved in the disposal of out-of-state generated wastes in Indiana than those involved in the disposal of in-state generated wastes.

Petitioners' "disparate impact theory of discrimination", which they suggest the Seventh Circuit adopted, is in fact a misreading of opinions of this Court. Because the back haul ban and registration/stickering program in fact eliminated all interstate commerce in out-of-state generated solid wastes, and imposed greater burdens on those participating in such commerce, petitioners' disparate impact theory which they attribute to the Seventh Circuit is not only inapposite but also incorrect.

IV. THERE IS NO CONFLICT IN THE CIRCUITS; MOREOVER THIS COURT HAS GIVEN THE GUIDANCE WHICH PETITIONERS SEEK

Petitioners next suggest that this Court ought review the Seventh Circuit's determination because of a conflict in the Circuits over the utilization of the term "discriminatory

effect", relying principally upon the Third Circuit's analysis in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). That case did, five years ago, read this Court's cases to conclude that "discriminatory effect" is limited to purposeful discrimination. *Id.* at 400. Finding none, the Third Circuit upheld a statute challenged on Commerce Clause grounds upon application of the *Pike* test. The issue which petitioners recite must be clarified by this Court — whether "discriminatory effect" cases are governed by strict scrutiny absent purposeful discrimination — appears to have been previously answered in the affirmative by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and further refined and discussed by this Court *after Oberly* and each of the cases relied upon to support petitioners' contention of confusion were decided. *Since Fort Gratiot* itself applied heightened scrutiny to a facially neutral statute which permitted each of Michigan's 83 counties to bar the disposal of all out-of-county generated wastes, thereby allowing each county to isolate itself from the national economy, because it "unambiguously discriminated against interstate commerce", the need for guidance to the Circuits seems nil. This conclusion is buttressed by this Court's Opinion in *Chemical Waste Management*, which links elevated scrutiny to a finding that the statute constitutes economic protectionism or isolation, which:

> "May be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977) or discriminatory effect, *see Philadelphia v. New Jersey, supra*," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). The "virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra*, 437 U.S. at 624 applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns

by discriminating arbitrarily against interstate trade. *Maine v. Taylor*, 477 U.S. 131, 148, n.19 (1986)."

Chemical Waste Management, *supra*, 112 S.Ct. at 2015, n.6.

Finally, both the Seventh Circuit and the trial court acknowledge that the purpose of the enactments was to impede the importation of MSW. [App. 19, 58.] Thus, the question which petitioners contend needs clarification from this Court would not be reached were the Petition granted, even were its Commerce Clause analysis correct.

V. PETITIONERS' CLAIMED "ERROR" IS IRRELEVANT TO THE SEVENTH CIRCUIT'S JUDGMENT

At bottom, petitioners' contentions fail because the Seventh Circuit used elevated scrutiny to analyze the back haul ban and vehicle registration/stickering program not because of any disproportionate impact upon out-of-state persons and entities involved in interstate commerce in MSW, but rather, because of the blockage of interstate commerce. [App. at 19-20, 34.]

The Seventh Circuit agreed that the Commerce Clause does not protect a particular structure or method of operation of business. Rather, the Court deemed strict scrutiny applicable because, with raised transport costs, Indiana has in effect erected an economic barrier against the importation of municipal waste. [*Id.*]

VI. THE SEVENTH CIRCUIT'S ALTERNATIVE HOLDING UNDER THE *PIKE* TEST PROVIDES A CORRECT AND INDEPENDENT BASIS FOR ITS DECISION

In striking down the challenged Indiana statutes, the Seventh Circuit determined that not only are the statutes unconstitutional under the elevated scrutiny standard, but also, "[s]o weak is the rationale offered by Indiana, that even when the statutes are examined under the *Pike* test,

the same result is reached". [App. 32.] Petitioners unjustifiably criticize the Seventh Circuit's *Pike* analysis as an example of improper judicial second-guessing of legislative policy judgments. [Pet. at 12, 21, and 26.]

The Seventh Circuit did exactly what this Court has consistently required since *Pike*: determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits". *Pike*, *supra*, 397 U.S. at 142. Respecting burden, the Seventh Circuit found, for reasons explained above, that "the statutes at issue here would effectively bar the importation of out-of-state waste into Indiana", and that this burden on interstate commerce was "clearly excessive in relation to the putative local benefits of the statutes". [App. 34].

Respecting local benefits, Indiana had asserted *post hoc* justifications: preventing adverse health effects that arise from cross-hauling and protecting the commercial reputation of Indiana products. Although an evidentiary hearing was held specifically for the purpose of presenting evidence regarding "putative local benefits", petitioners presented none. Under these circumstances, the Seventh Circuit, not surprisingly, found that petitioners had failed to demonstrate "a realistic possibility that Indiana goods will actually be contaminated and that contamination will adversely affect their reputation". [App. 22.]

Petitioners cannot challenge this dispositive finding. They presented no evidence of an adverse effect of cross-hauling on anyone's pocketbook. They failed to identify a single instance of contamination or a single person who was damaged by cross-hauling.

In assessing the putative local benefit to health, the Seventh Circuit correctly discerned that Indiana was not acting "to protect its own citizens' health". [App. 22.] If anyone's health were to be affected by cross-hauling of solid waste with other goods, it would be the recipients of Indiana goods in the eastern United States. *Id.* In assessing

putative *local* benefits, the Seventh Circuit properly concluded that Indiana's primary interest arising from contaminated goods affected the health of users was in tarnishing the commercial reputation of Indiana goods. This analysis is fully consistent with the precedent of this Court. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

Petitioners also criticize the Court of Appeals for observing that the challenged statutes fall short of achieving the claimed benefits because of a loophole big enough to drive a fleet of garbage trucks through. [Pet. at 23.] Specifically, the statutes fail to prevent cross-hauling of Indiana goods in trucks that have hauled solid waste for disposal in Illinois, Ohio, Kentucky or any state other than Indiana. As a result, Indiana's statutes will at best, "further their stated purpose only marginally". [App. 33.] This Court has specifically approved judicial assessment of whether putative local benefits are furthered only marginally in making the determination required by *Pike*. *E.g.*, *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion).

The statutes in question fail not only the *Pike* and elevated scrutiny tests, but also they violate another well-settled prong of Commerce Clause analysis due to their extra-territorial effect. As this Court has repeatedly held, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. Thus, no state can adopt legislation that has the practical effect of establishing prices or controlling commerce occurring wholly outside the boundaries of the state, regardless of whether the statutes' extra-territorial reach was intended by the legislature. *E.g.*, *Healy v. Beer Institute, Inc.*, 109 S.Ct. 2491 (1989); *Brown-Forman Distillers v. N.Y. State*, 476 U.S. 573 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion).

Here, the back haul ban and registration/sticker program extend the reach of Indiana law into the manner of conduct of business in every other state. For this reason alone, these statutes are violative of the Commerce Clause. Although raised before the Seventh Circuit, resolution of this issue was unnecessary to its decision. If certiorari were granted, this ground alone suggests that petitioners' other issues need not be addressed.

VII. THE $100 REGISTRATION FEE WAS PROPERLY STRUCK DOWN PURSUANT TO THIS COURT'S ANALYSIS IN *SCHEINER*

Petitioners' last argument for Supreme Court review is that the Seventh Circuit erred by applying "flat tax" analysis to strike down a flat $100 registration fee for vehicles or fleets engaged in transporting solid waste in Indiana. [Pet. at 25-26.] Petitioners' argument on this issue is cursory and meritless.

Petitioners' argument overlooks the critical finding of the trial court that "the $100 registration fee may be prohibitive" [App. 58] for interstate truckers who haul MSW to Indiana only occasionally while posing no significant burden on intrastate haulers. Whatever Commerce Clause analysis is employed, whether it be derived directly from the flat tax cases such as *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266 (1987), or non-tax cases like *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), when the effect of a state statute on interstate commerce is so pronounced as to be prohibitive while at the same time inconsequential to intrastate commerce, the Commerce Clause is violated.

Contrary to petitioners' implication, this Court has never limited its "flat tax" analysis to "taxes" that have been denominated as such.

In any event, petitioners' argument provides no substantial basis for Supreme Court review since Indiana's

entire registration and licensing scheme is constitutionally infirm. As the Seventh Circuit explained:

> "Indiana's registration and stickering provisions are part and parcel of its backhaul ban. Their primary purpose, as Indiana concedes, is to facilitate the enforcement of the backhaul ban. To the extent they are linked to the backhaul ban, they fall with it."

[App. 23.] Since the only purpose of the $100 registration fee is to fund the registration program, it matters not whether the Seventh Circuit's flat tax analysis was correct since the registration program and its supporting fee cannot stand for a wholly independent and adequate reason.

CONCLUSION

The unanimous panel decision of the Seventh Circuit Court of Appeals striking down Indiana's back haul ban and vehicle registration/stickering program under both the strict scrutiny and *Pike* tests is unassailable since it is in strict conformance with this Court's Opinions. Petitioners' contrary contentions are based upon a profound and fundamental misreading and disregard of this Court's Opinions, wrongly equating facial neutrality with evenhandedness, and assuming that the statutory blockage of all interstate commerce withstands analysis under either elevated scrutiny or *Pike* standards. Given this Court's Opinions this year in *Fort Gratiot*, *supra*, and *Chemical Waste Management*, *supra*, reaffirming resoundingly the tenets of *City of Philadelphia*, and the Seventh Circuit's reliance upon these cases, there is no tenable basis to contend that this Court's review is needed or warranted.

Therefore, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Petitioners,

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

The Indiana statutes on backhauling and vehicle registration and labeling impose exactly the same rules on both interstate and local shipments of trash. The district court found that those laws serve legitimate state interests. App. 55, 59. They protect the commercial reputation of Indiana products, protect those who come in contact with those products from health risks of an unknown magnitude, and provide greater accountability for compliance with Indiana's system of solid waste regulation. App. 53-55, 57-59.

The question presented is whether these statutes nevertheless violate the dormant Commerce Clause, principally on the theory that the laws have a "disparate impact" on interstate businesses because of their preferred methods of operation. At bottom, this case squarely presents the question of just what constitutes "discrimination" under the Commerce Clause. Contrary to the Seventh Circuit's "disparate impact" theory, the Commerce Clause does not require States to exempt interstate transactions from laws of general application.

In opposing certiorari, respondents have illustrated the need for clarification in this area of the law. They repeatedly and mistakenly treat this Court's decisions involving State laws that facially discriminate against commerce crossing State (or local) boundaries as cases of "discriminatory effect." Respondents also oppose certiorari with a challenge to petitioners' motives that the district court rejected as immaterial and the court of appeals did not address. Because the district court made no findings on that disputed factual issue, respondents' argument is not properly before this Court. Finally, respondents try to reframe the issues by repeatedly asserting, contrary to the undisturbed findings of the district court, that the challenged laws do not serve legitimate State purposes. As shown in the Petition and this Reply, this Court should grant certiorari both to guide the lower courts as to what is "discrimination" under the dormant Commerce Clause, and to clarify the Commerce Clause standards that apply to facially neutral State laws that serve legitimate State purposes.

I. THIS COURT'S DECISIONS STRIKING DOWN FACIALLY DISCRIMINATORY STATUTES NEITHER RESOLVE THE ISSUE PRESENTED BY THE PETITION NOR SUPPORT THE DECISION BELOW.

Relying on three decisions of this Court, respondents argue that "discriminatory effect is a well-settled basis for applying elevated scrutiny" under the Commerce Clause. Resp. Br. at 13. All three involved a State law that, on its face, treated waste differently depending on whether it crossed a State or local boundary. In *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978), the challenged law simply banned garbage imports across the State border. Discrimination against interstate commerce could not be any clearer and was never at issue.

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ___, 112 S. Ct. 2009, 119 L. Ed. 2d 121, 132 (1992), the State law imposed a prohibitive fee only on waste that crossed the State boundary. Again, the facial discrimination was not disputed. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. ___, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992), the law banned garbage imports across county lines. Following *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), this Court held in *Fort Gratiot* that facial discrimination based on local boundaries also discriminates against interstate commerce and is subject to elevated scrutiny. 119 L. Ed. 2d at 149.

Although all three cases dealt with waste disposal, they offer no guidance in this case for the simple reason that all three involved facially discriminatory statutes. Such discrimination is the principal object of the dormant Commerce Clause. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). This Court has not extended heightened scrutiny to State laws that impose the same rules on local and interstate commerce, even where, as a result of some businesses' preferred methods of operation, the laws affect interstate businesses more heavily than local ones. *See CTS*, 481 U.S. at 88. This Court has never imposed elevated scrutiny on facially neutral laws found to serve legitimate State purposes.

II. THE CIRCUIT SPLIT ON THE "DISPARATE IMPACT" QUESTION SHOULD BE RESOLVED.

When "disparate impact" claims of discrimination have been presented to this Court under the dormant Commerce Clause, this Court has rejected them. Petition at 12-15. However, in some cases involving facially discriminatory laws, this Court has used language that can be read as inviting the "disparate impact" analysis the Seventh Circuit used here. The tension between this Court's holdings and its language in other cases has produced a conflict among the circuits and a clear request from the lower courts for further guidance on what constitutes discrimination under the Commerce Clause.

Respondents deny that the circuit split exists, yet they mention only the Third Circuit's decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 400 (3d Cir. 1987), and they fail to explain how that case could be reconciled with the Seventh Circuit's decision in this case. They do not even address the decisions of the Ninth, Eleventh, Second, and First Circuits that rejected "disparate impact" claims of discrimination. *See* Petition at 16.

Respondents' only explanation seems to be that this Court provided the needed guidance last term in *Fort Gratiot* and *Chemical Waste Management*, and they mistakenly claim that the law in *Fort Gratiot* was "facially neutral" when it was actually discriminatory on its face. *Compare* Resp. Br. at 23, *with* 119 L. Ed. 2d at 148-49. Both cases dealt with laws that imposed different rules on commerce depending on whether it crossed a State or local boundary. Neither opinion offers guidance on the question whether and under what circumstances a facially neutral law -- one imposing the same rules on local and interstate commerce -- can be treated as discriminatory. Thus, clarification and guidance are still needed to resolve the conflict.

III. RESPONDENTS HAVE FAILED TO EXPLAIN AWAY THIS COURT'S COMMERCE CLAUSE DECISIONS REJECTING DISPARATE IMPACT CLAIMS OF DISCRIMINATION.

In *CTS Corp. v. Dynamics Corp. of America*, *supra*, 481 U.S. at 88; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981); and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978), this Court expressly rejected claims that facially neutral statutes discriminated against interstate commerce based on a "disparate impact" theory. Respondents have tried to explain away *CTS* and *Exxon*, apparently relying on a distinction they see between "discriminating against articles in commerce themselves, as opposed to regulating the structure of entities conducting the commerce." Resp. Br. at 21. They suggest that *CTS* was decided on the ground that the "burden of the state's regulation fell not on the article of commerce itself, but rather upon those most likely to attempt a hostile takeover who this Court assumed resided out-of-state." *Id.* at 22.

Frankly, petitioners do not understand this proposed distinction. But whatever it means, *CTS* offers not the slightest support for it, and petitioners are aware of no support for it in this Court's long history of Commerce Clause decisions. The proposed distinction between the "article of commerce" and those engaged in commerce seems to suggest that the Commerce Clause grants rights to shares of stock, loads of coal, milk jugs, and garbage bales, but not to citizens engaged in interstate commerce. *Cf. Dennis v. Higgins*, 498 U.S. ___, 111 S. Ct. 865, 112 L. Ed. 2d 969, 977-80 (1991) (Clause confers "rights" within meaning of § 1983).

IV. RESPONDENTS' ATTACK ON THE STATE'S MOTIVES IS IMMATERIAL AND RAISES A LEGAL ISSUE NOT PRESENTED BY THIS CASE.

The district court correctly held the Indiana backhauling and vehicle registration laws are facially neutral and upheld them because they will serve legitimate State purposes. In this Court, as

in the district and circuit courts, respondents try to undermine the neutral laws by attacking the subjective motives of petitioners, claiming that the facially neutral laws were motivated by a desire to stop garbage imports into Indiana rather than to gain the benefits found by the district court.

This case does not present any motive issue. After hearing conflicting evidence on the issue, the district court correctly ruled that the question of subjective motives or expectations was immaterial under the Commerce Clause. The court therefore made no findings on that disputed question of fact and applied an objective test under the Commerce Clause. App. 51, following *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739, 769 (S.D. Ind. 1990), and cases cited therein; *accord*, *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968)(rejecting motive test under First Amendment); *Kassel v. Consolidated Freightways, Inc.*, 450 U.S. 662, 702-03 (1980)(Rehnquist, J., dissenting) (rejecting motive inquiry under Commerce Clause).

The Seventh Circuit did not base its decision on motive, but respondents rely on its comment that "the 'circumstances of enactment suggest that it was the principal objective' of the statutes to impede importation of trash." App. 19. With all due respect, to the extent that comment purported to resolve a disputed factual issue about which the district court made no findings, it was not appropriate. Petitioners presented evidence showing that the only reasons the legislature considered were precisely those found by the district court -- *i.e.*, protection of commercial reputation and public health, and better accountability and enforcement of Indiana's entire system of solid waste regulation. Respondents presented no evidence about the motives of any member of the Indiana legislature, but claimed that petitioners Bayh and Prosser supported these laws as part of a campaign to stop waste imports. The evidence showed that Bayh and others sought *Congressional* authority to restrict garbage imports, but those entirely proper efforts cannot taint the constitutionality of these facially neutral laws that serve legitimate State purposes.

V. RESPONDENTS' ARGUMENTS UNDER THE *PIKE* TEST ARE NOT BASED ON THE RECORD OR THE DISTRICT COURT'S FINDINGS.

The Seventh Circuit erred by substituting its legislative and economic judgments for those of the Indiana legislature when it applied the balancing test stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Petitioners need to correct a number of assertions respondents make about the district court's findings, especially those concerning the benefits and burdens of the laws.

On the benefit side of the scales, the district court expressly found that the backhauling law "protects the reputation of Indiana goods," and that the conflicting evidence on health risks allowed the legislature to determine that backhauling posed health risks. App. 55. Respondents' claims notwithstanding, the benefits were not "*post hoc* justifications," and the evidence on commercial reputation was so substantial that additional evidence was excluded as cumulative. App. 41. After hearing the conflicting evidence on health risks, the district court correctly ruled that the legislature "is not required to wait for scientific verification and the publication of learned articles," and that the legislature was "well within its rights to determine that backhauling posed health risks." App. 53-55. *Accord*, *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (State need not sit idly by until damage has occurred or until scientific community agrees on danger). Nor did the district court ever find that the public's or the State's concerns supporting the law were irrational.

On the burden side, the district court did *not* find, as respondents claim, that the backhauling law would stop garbage imports into Indiana. It found that the cost of disposing of garbage in Indiana would go up, and that Indiana would no longer be the cheapest State for the disposal of respondents' garbage. App. 55. But "[l]ower profits do not constitute a clearly excessive burden on interstate commerce in relation to these obvious benefits." *Id.*

Moreover, the district court did not find that respondents' preferred methods of operation were the only practical way to import garbage. The court found that flat bed trailers and "dump trailers" are also used for waste shipments. App. 43. The

evidence showed that such trailers were suitable for handling materials exempt from Indiana's backhauling law, that many other commodities are already shipped on dedicated fleets, and that dedicated fleets exist for long-distance shipments of municipal waste. Moreover, on the eve of the backhauling law actually taking effect, out-of-state entities had registered thousands of vehicles to transport and dispose of waste in Indiana. *See* Petition at 7 n.5.

The benefits of the vehicle registration and labeling law include providing shippers with information they want, and helping Indiana enforce its other solid waste laws through greater accountability for those in the waste business, in addition to enforcing the backhauling law itself. App. 59. On the burden side, the district court rejected the suggestion that forcing truckers to tell their customers that their trucks had hauled garbage could be a cognizable burden on commerce. App. 57-58.[1]

The Seventh Circuit did not hold any district court finding to be clearly erroneous. Rather, it first analyzed the findings and evidence under the exacting standards applied to facially discriminatory statutes and found these statutes did not satisfy that stringent test. App. 21-25. When it shifted to the *Pike* test, the Seventh Circuit again did not reverse any finding as clearly erroneous, but borrowed most of its earlier analysis under the elevated scrutiny test. It asserted that Indiana should not "bow[ ] to unreasoned public opinion" threatening the reputation of Indiana products, that Indiana had no interest in the health of citizens of other States who receive Indiana products, and that Indiana should rely on "market forces alone" to protect its interests. App. 33-34, 22-23.

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[1]Respondents also suggest that the vehicle registration and labeling law is "extraterritorial." Resp. Br. at 26-27. Respondents waived this claim below by raising it for the first time in their post-trial reply brief, and neither the district court nor the court of appeals addressed it. In any event, the claim is meritless. Indiana's law does not purport to control conduct occurring wholly outside its borders.

After substituting its judgment on these matters for that of the Indiana legislature, and after finding that Indiana could have served its interests better with an even broader law, App. 33-34, the Seventh Circuit held that the Indiana laws fail the *Pike* balancing test. The *Pike* test was not intended to authorize such exacting scrutiny of evenhanded State legislation, and this Court has not used it that way. Accordingly, this Court should also grant certiorari to clarify that *Pike* does not allow such judicial policymaking under the Commerce Clause.

CONCLUSION

This case squarely presents on a full record the question whether a facially neutral State statute that serves legitimate purposes can be struck down as discriminatory under the dormant Commerce Clause. The issue deserves this Court's plenary review because of the conflicting signals from this Court, the conflict in the circuits, and the lower courts' request for guidance. The dormant Commerce Clause does not protect the preferred business practices or current profit margins of interstate businesses, nor does it authorize the degree of federal intrusion into a State's police power exhibited in the Seventh Circuit's decision. This Court should therefore issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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